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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1980

CHEVRON CHEMICAL COMPANY, a corporation,
Petitioner,

vs.

Administrator,
United States Environmental Protection Agency,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Third Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Where the owner of trade secrets furnishes those secrets to an agency of the Federal Government in confidence, may that agency use those secrets, to their owner's competitive disadvantage, for the benefit of the owner's competitors even though the applicable state law of trade secrets bars use for the benefit of the owner's competitors?

2. Where the owner of trade secrets furnishes those secrets to a Federal agency in confidence, are the owner's trade secret rights defined by the statute (18 U.S.C. § 1905) which imposes criminal penalties upon Federal Government employees for disclosing trade secrets, rather than the applicable state law of trade secrets which bars their use for the benefit of competitors?

3. Is the ruling below—that, in 1975, Congress "implicitly [rejected the] position that there is a common law property right of exclusive use" of trade secret information provided under the Federal Insecticide, Fungicide and Rodenticide Act—contrary to this Court's holding that the 1975 amendments to that Act did "not at all address the issues of the conditions under which pre-1970 data may be used in considering another application" (*Mobay Chemical Corp.* v. *Costle* (1979) 439 U.S. 320)?

4. Absent any statutory authorization, is a Federal agency to which trade secrets have been furnished in confidence nonetheless empowered to use those secrets, to the owner's competitive disadvantage, for the benefit of the owner's competitors?*

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*The parties are set forth in the title. Chevron Chemical Company is a wholly owned subsidiary of Standard Oil Company of

California, a publicly owned corporation. Standard Oil Company of California owns stock in the following publicly owned corporations:

Huntington Beach Co.
AMAX, Inc.
Cetus Corp.

Standard Oil Company of California also owns stock in the following corporations: American Overseas Petroleum Limited; Pars Investment Corporation; Caltex Petroleum Companies; Irving Oil Company, Limited; Irving Oil Limited; Trans Mountain Oil Pipe Line Company; C-W Properties, Inc.; Glenwood Properties; Arabian American Oil Company; Calpam B.V.; Caltex (Kalteks) Petrol Amonim Sirketi; Caltex Mediterranean Limited; Caltex Oil, Sociedad Anonima Espanola; Caltex Deutschland G.m.b.H.; Deutscher Kraftverkehr Ernst Grimmke; Chevron Transport Corporation; N.V. Rotterdam-Rijn Pijpleiding Maatschappij; Societa per Azioni Raffineria Padana Olii Minerali SARPOM; The Associated Octel Company Limited; Societe d'Etude et d'Exploitation de la Raffinerie du Tchad; Chevron Oil Company of Portugal; Rimbey Pipe Line Co., Ltd.; Sultran Ltd.; Chevron Transport Corporation; First Colony Life Insurance Company; Iranian Oil Participants Ltd.; Iranian Oil Services (Holdings) Ltd.; Oil Insurance Limited; P.T. Caltex Pacific Indonesia; Refineria Petrolera de Guatemala-California, Inc.

Chevron Chemical Company owns stock in the following corporations: Aditivos Mexicanos, S.A.; Cansulex Limited; BP-California Limited; Coromandel Fertilisers Limited; Karonite Chemical Company, Limited; Nippon Petroleum Detergent Company, Limited; Orobis Limited; Orogil, S.A.; Petrosynthese, S.A.; Societe Calgil.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, dated February 4, 1981, is printed in Appendix A. The opinion of the district court ((D.Del. 1980) 499 F.Supp. 732) is printed in Appendix B.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Third Circuit were filed and entered on February 4, 1981 (Appx.A), and its order denying rehearing was filed and entered March 3, 1981 (Appx.D). This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

This case involves § 3(c)(1)(D) of the Federal Insecticide, Fungicide and Rodenticide Act, commonly known as FIFRA, the pertinent provisions of which are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner, CHEVRON CHEMICAL COMPANY ("Chevron"), produces and sells pesticide products, including products containing naled or paraquat, two compounds which Chevron has tested extensively to determine their safety, efficacy, and environmental impact (Appx.A, p. A-3). The compilation of the naled and paraquat data by Chevron cost several million dollars and required scientific and technical know-how believed to be possessed only by Chevron (Appx.B, p. A-39).

The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") has required at all pertinent times that, in order to sell pesticides in interstate commerce, a company submit test data proving the safety of its pesticide products to the United States Department of Agriculture ("USDA") prior to 1970 and, after 1970, to EPA. To obtain the legally required registrations to sell its naled and paraquat pesticides, Chevron submitted test data on naled and paraquat to USDA, prior to 1970, in confidence and solely for the purpose of supporting Chevron's own applications for pesticide registration. USDA's policy (as distinguished from the policy of its successor, EPA, which is referred to in the opinion of the Court of Appeals) was that confidential data submitted by one applicant would not be used to support applications of competitors without

the express authorization of the original applicant. Notwithstanding the foregoing, EPA's Administrator now proposes to use Chevron's test data submitted to USDA to benefit Chevron's competitors.

EPA has expressly conceded that Chevron's pre-1970 test data includes trade secrets (Appx.B, p. A-39).[1] Chevron's possession and use of the data give it a substantial competitive advantage over those who do not use or have access to that data. Any use by EPA of that data to support the pesticide registrations of Chevron's competitors would substantially injure Chevron's competitive position: Since Chevron's competitors would not have to incur the immense cost necessary to produce the data, Chevron alone would, in effect, be forced to bear the burden of developing safety data on naled and paraquat for the entire industry.

Prior to 1972 FIFRA contained no reference to the use of data submitted by one company to support registrations of competing pesticide manufacturers. In 1972, Congress amended FIFRA (Appx.C, pp. A-61—A-62) to provide a procedure under which an applicant for a pesticide registration could request EPA to consider *non-trade secret* data previously submitted by other applicants. The 1972 amendments contained a prohibition against EPA's use of

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[1]EPA's counsel expressly conceded that

> "• • • for purposes of the summary judgment motion we can assume that everything that they have claimed to be a trade secret is in fact a trade secret.
>
> • • • • •
>
> "• • • For purposes of their injunctive relief I think we have to assume the same thing."

trade secret data for the benefit of competing applicants without permission of the original applicant.

In 1975, Congress again amended FIFRA (Appx.C, pp. A-62—A-63). The 1975 amendments did not apply to the use of pre-1970 data (*Mobay Chemical Corp.* v. *Costle* (1979) 439 U.S. 320). As to post-1969 data, the 1975 amendments retained the prohibition against the use of trade secrets for the benefit of competing applicants but authorized EPA to use non-trade secret data. In 1978, Congress once more amended FIFRA (Appx.C, pp. A-63—A-66). The 1978 amendments made no reference to pre-1970 data but authorized the use by EPA of post-1969 trade secret data.

Chevron held a patent on naled and obtained licenses from the patent holder of paraquat; both patents expired in February 1978 (Appx.B., p. A-39). A number of Chevron's competitors, seeking to market naled and paraquat products, have submitted registration applications to EPA (ibid.). EPA's Administrator intends to rely on Chevron's pre-1970 and post-1969 data in support of these applications and, if such reliance is permitted, will, on that basis, issue registrations to one or more of Chevron's competitors (ibid.).

Chevron commenced this action in the district court seeking injunctive and declaratory relief against EPA's Administrator. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331(a), 1337 and 1361, and under 7 U.S.C. §§ 136n(a) and (c). The complaint alleged that EPA's Administrator threatened to use, for the benefit of Chevron's competitors, two kinds of trade secret data:

(1) data submitted by Chevron to USDA prior to January 1, 1970 ("pre-1970 data") and (2) data submitted by Chevron after December 31, 1969 ("post-1969 data").

(1) As to the pre-1970 data, the complaint alleged that there is no statutory authorization for EPA to use pre-1970 trade secret data on behalf of Chevron's competitors.[2]

(2) As to the post-1969 data, while FIFRA as amended in 1978 (Appx.C., pp. A-63—A-66) does authorize such use of Chevron's data, Chevron alleged a violation of the Fifth Amendment in that Chevron had no adequate remedy to protect its interests in its post-1969 trade secret data. The issue as to the post-1969 data is not involved in this petition.

The district court denied a motion by Chevron for a preliminary injunction and granted the Administrator's motion for summary judgment (Appx.B, p. A-60). The district court ruled that EPA's use of Chevron's pre-1970 trade secret data was authorized by the 1978 amendments to § 3(c)(1)(D) of FIFRA (Appx.B, pp. A-41—A-48).[3]

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[2]Chevron also alleged that, in any event, the use of such data without compensation to Chevron would violate its rights under the Fifth Amendment to the Constitution of the United States.

[3]As to the post-1969 data—which is not here involved—the district court ruled that Chevron was not entitled to an injunction on the ground that its remedy was in a claim for damages in the Court of Claims under the Tucker Act (28 U.S.C. § 1491) and an injunction was unavailable (Appx.B, pp. A-52—A-55). As to pre-1970 trade secret data, however, it is undisputed that if, as Chevron contends, the Administrator has no authority to use that data, Chevron would be entitled to an injunction to restrain the Administrator from acting in excess of his statutory authority (*Philadelphia Co.* v. *Stimson* (1912) 223 U.S. 605, 620; *Larson* v. *Domestic & Foreign Corp.* (1949) 337 U.S. 682, 690-691, 699-700).

A timely appeal was taken to the Court of Appeals for the Third Circuit, which had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). The Court of Appeals granted an injunction pending appeal. Thereafter, the Court of Appeals affirmed the district court's order denying a preliminary injunction and granting a summary judgment, on grounds different from those relied on by the district court (Appx.A, p. A-22). The Court of Appeals held that Chevron had no protectible right in confidential information submitted to EPA and its predecessor agencies (Appx.A, pp. A-22—A-26). It reasoned that, under Federal statutory law, Chevron had no right to prevent EPA's Administrator from using Chevron's trade secrets to benefit Chevron's competitors and that Chevron could not rely on state law to prevent such use by a Federal agency (Appx.A, pp. A-24—A-26). In view of its conclusion that Chevron had no right to prevent a Federal agency from using Chevron's trade secrets to benefit its competitors, the Court of Appeals considered it unnecessary to determine the issues decided by the district court. On March 3, 1981, the Court of Appeals denied Chevron's petition for a rehearing (Appx.D).

REASONS FOR GRANTING CERTIORARI

This case has broad impact beyond the specific context of pesticide regulation. It is of great importance to the Federal Government's ability to encourage submission of trade secret information and to encourage thorough testing of products. The ruling below—that the owner of trade secret information provided to the Federal Government in confidence has no right to prevent a governmental official from using it for the benefit of the owner's competitors—will dis-

courage the development and submission to the Government of trade secret information, including information essential to public safety. Without assurance that Federal agencies will not use information for the benefit of competitors, businesses will decline to expend the substantial time, effort and money often necessary to develop and submit information required by Federal regulations. Products essential to the nation's economy may be delayed, left untested, or even not developed and marketed at all.

The ruling below that an agency of the Federal Government may use, for the benefit of Chevron's competitors, information provided by Chevron in confidence directly conflicts with a holding of the Court of Appeals for the Second Circuit in *Kramer* v. *Secretary, U.S. Department of the Army* (1980) ..... F.2d ..... (Appx.E). Rather than looking to state law when considering Chevron's expectation of confidentiality and property interest, the court below erroneously held that Chevron's expectation of confidentiality was limited to the rights defined by a Federal criminal statute, the Trade Secrets Act, 18 U.S.C. § 1905 (Appx.A, pp. A-25, A-28).

Because of its constrictive view of Chevron's trade secret rights as against a governmental agency, the Court of Appeals purported not to reach the principal issue presented to it—whether Congress has authorized EPA's Administrator to use, for the benefit of Chevron's competitors, pre-1970 trade secrets that Chevron had furnished to support its own pesticide registrations. The opinion concluded, however, that Congress in 1975 implicitly authorized EPA to use Chevron's pre-1970 trade secret

information in support of applications filed by Chevron's competitors (Appx.A, p. A-13). In this, the ruling below conflicts with this Court's decision in *Mobay Chemical Corp.* v. *Costle* (1979) 439 U.S. 320 that the 1975 version of FIFRA did *not* authorize EPA to use one company's pre-1970 trade secrets to register a competitor's pesticides.

Clearly the issues presented are of utmost importance not only to the administration of FIFRA and similar statutes but indeed to the Federal Government's ability to encourage submission of trade secret information in confidence.

I. THE RULING BELOW THAT TRADE SECRET INFORMATION PROVIDED TO A FEDERAL AGENCY IN CONFIDENCE IS NOT PROTECTED AGAINST USE BY THAT AGENCY FOR THE BENEFIT OF COMPETITORS WILL HAVE A DEVASTATING EFFECT ON THE FEDERAL GOVERNMENT'S ABILITY TO ENCOURAGE SUBMISSION OF TRADE SECRET INFORMATION AND TO ENCOURAGE THOROUGH TESTING OF PRODUCTS.

In order to carry out their regulatory missions, Federal agencies often require businesses to submit trade secret information relating to the safety of products to be marketed to the public. For example, the Food and Drug Administration ("FDA") receives trade secret information in approving new drugs, antibiotics, and food and color additives; EPA receives trade secret information in regulating pesticides and chemicals. In some contexts, Congressional legislation explicitly provides that trade secret information submitted by one applicant may be used by the agency in support of other applications. The Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629, adopts this approach and provides a compensation system whereby

the original submitter of data is reimbursed by subsequent applicants who rely on his data. In other contexts, however, where no statutory provisions control agency use of trade secret data, the Federal Government encourages submission of trade secret information by maintaining a policy of receiving the information in confidence. FDA, for example, has taken the position that test data submitted to support approval of a new drug is confidential; moreover, an applicant may not rely on confidential, undisclosed information submitted by a prior applicant (39 Fed.Reg. 44,634 (1974); 21 C.F.R. § 314.1(b) (1980)).

In discussing the trade secret data supporting drug applications, FDA has expressly warned against the practical effect of not protecting the trade secrets submitted to it:

> "Such information costs hundreds of thousands, and in some instances, millions of dollars to obtain. Release of such information would allow a competitor to obtain approval from the Food and Drug Administration for marketing the identical product, at a mere fraction of the cost. * * *
>
> "* * * If a manufacturer's safety and effectiveness data are to be released upon request, thus permitting 'me-too' drugs to be marketed immediately, it is entirely possible that the incentive for private pharmaceutical research will be adversely affected" (39 Fed.Reg. 44,634 (1974)).

This rationale is equally applicable to the case at bar, where the ruling that trade secrets are not protected against competitive use allows "me-too" producers to market their products immediately, thus dampening the incentive for research.

The ruling below—that, absent Federal statutory protection, trade secret information provided to the Federal Government in confidence is not a protected property right—also runs contrary to well-established principles of Federal constitutional law and state common law of trade secrets. This Court has often recognized that

> "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .'" (*Webb's Fab. Pharmacies, Inc.* v. *Beckwith* (1980) ..... U.S. ..... [101 S.Ct. 446, 450], quoting *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 577).

Chevron's property interest in the present case is defined by the law of Chevron's states of incorporation and principal place of business; *both states recognize that trade secrets are property:* In Chevron's principal place of business, California, the courts clearly recognize that "a trade secret is private property" (*Sinclair* v. *Aquarius Electronics, Inc.* (1974) 42 Cal.App.3d 216, 223, 116 Cal.Rptr. 654). In Delaware, Chevron's state of incorporation and the forum state, a trade secret is a "property right" (*Data Gen. Corp.* v. *Digital Computer Controls, Inc.* (Del.Ch. 1975) 357 Atl.2d 105, 110) and, in any event, "trade secrets are entitled to protection '* * * regardless of the supporting legal label * * *'" (357 Atl.2d 112). In *Kewanee Oil Co.* v. *Bicron Corp.* (1974) 416 U.S. 470, this Court pointed out that state trade secret laws protect "intellectual property" (416 U.S. 478), and recognized that

> "'[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it' " (416 U.S. 474-475).

Contrary to the approach taken by the Court of Appeals, this Court pointed out, in *Kewanee*, that

> "*The protection* accorded the trade secret holder *is against* the disclosure or *unauthorized use* of the trade secret by those to whom the secret has been confided under the express or implied restriction of nondisclosure or nonuse" (416 U.S. 475; emphasis added).

This is so because "[o]ne who has a trade secret may be harmed * * * by the use of his secret in competition with him. * * * The rule * * * protects the interest in a trade secret *against* both disclosure and *adverse use*" (Rest. of Torts § 757, comment c; emphasis added).

The Court of Appeals' erroneous view of the pertinent administrative practice contributed to its conclusion that trade secret information provided to the Federal Government is not property protected against use for the benefit of competitors. EPA's counsel expressly conceded in the district court that Chevron's data contained trade secrets. Chevron showed that it had submitted its pre-1970 trade secret data in confidence to USDA, EPA's predecessor, and USDA had a policy that data submitted by one applicant would not be used to support registration application by others without the consent of the original applicant. The assumption to the contrary by the Court of Appeals was based entirely upon *its* view of the post-1970 practices

of EPA. The pertinent practices, however, are those of USDA, to which that data was submitted.[4]

The issues presented require consideration by the Court, in light of both the devastating effect the ruling below will have on the Federal Government's ability to encourage submission of trade secret information in confidence and the ruling's conflict with well-established legal principles.

II. IN HOLDING THAT A GOVERNMENTAL AGENCY MAY USE, FOR THE BENEFIT OF PETITIONER'S COMPETITORS, INFORMATION PROVIDED BY PETITIONER IN CONFIDENCE, THE COURT OF APPEALS FOR THE THIRD CIRCUIT HAS CREATED A CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT. MOREOVER, THE COURT BELOW ERRONEOUSLY HELD THAT PETITIONER'S TRADE SECRET RIGHTS ARE DEFINED BY A FEDERAL CRIMINAL STATUTE (THE TRADE SECRETS ACT, 18 U.S.C. § 1905) RATHER THAN BY STATE LAW.

The ruling below that an agency of the Federal Government may use, for the benefit of Chevron's competitors, information provided by Chevron in confidence is in direct conflict with the decision of the Second Circuit Court of Appeals in *Kramer* v. *Secretary, U.S. Department of the Army* (2 Cir. July 16, 1980; rehearing denied October 2, 1980) No. 79-6163, ... F.2d ..... (Appx.E). In *Kramer,* the Second Circuit specifically held that, like a private citizen,

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[4]In the district court, EPA did not concede that this was USDA's practice but did concede that agency practice prior to 1972 presented a disputed factual issue. The assumption by the Court of Appeals as to agency practice, in any event, violated the principle that a summary judgment may not be affirmed on the basis of material facts which are in dispute (*Fountain* v. *Filson* (1949) 336 U.S. 681, 683).

an agency of the Federal Government may not make unauthorized use of trade secrets which were submitted to it in confidence. It held that if the appellant proved

> "* * * simply that she provided [trade] secret information to the Government in confidence, and that the Government subsequently made unauthorized use of that information * * *, this alone would establish the Government's liability" (Appx.E., p. A-74).

The facts underlying the Second Circuit's *Kramer* holding parallel those in the case at bar. Appellant Kramer, like Chevron, alleged that she had disclosed information to an agency of the Federal Government only in reliance on the Government's commitment to treat that information in confidence. In holding that the Secretary of the Army may not use, for the benefit of Kramer's competitors, trade secret information provided in confidence, the Second Circuit ruled that the Government is bound by the applicable state law that " 'One does not have a right to secure a trade secret or invention by reason of a confidential relationship and to use it without accounting to the source' " (Appx.E, pp. A-74—A-75).

In *Kramer,* the governmental agency had already used the trade secret in question; thus, the only remedy available was damages under the Federal Tort Claims Act (Appx.E, p. A-73). In contrast, EPA has not yet used Chevron's trade secret data. Under the applicable state common law of trade secrets, injunctive relief is always available to prevent unauthorized use of trade secret information (Rest. of Torts § 757, comment e). Accordingly, Chevron seeks to enjoin EPA's Administrator from using,

for the benefit of Chevron's competitors, trade secret information provided by Chevron in confidence.[5]

The holding in *Kramer* is in sharp contrast to the holding that Chevron's expectation of confidentiality was defined solely by a Federal criminal statute, the Trade Secrets Act (18 U.S.C. § 1905). Although the Court of Appeals purported to recognize that the Trade Secrets Act is a criminal statute and does not confer a private, civil cause of action (Appx.A, p. A-24; see *Chrysler Corp.* v. *Brown* (1979) 441 U.S. 281, 316-317), it nevertheless held that "[p]rior to 1972, • • • 18 U.S.C. § 1905 and agency practice defined the scope of [Chevron's] expectation [of confidentiality]" (Appx.A, p. A-25; see also p. A-28). This reliance upon the Trade Secrets Act rather than the applicable state trade secret law conflicts not only with the Second Circuit's *Kramer* ruling, but also with this Court's prior decisions defining property interests (see *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 574).

III. THE RULING BELOW THAT CONGRESS HAS IMPLICITLY AUTHORIZED EPA'S ADMINISTRATOR TO USE PETITIONER'S PRE-1970 TRADE SECRET INFORMATION IN SUPPORT OF APPLICATIONS FILED BY PETITIONER'S COMPETITORS IS CONTRARY TO THE DECISIONS OF THIS COURT IN MOBAY CHEMICAL CORP. v. COSTLE (1979) 439 U.S. 320 AND YOUNGSTOWN CO. v. SAWYER (1952) 343 U.S. 579.

Because of its erroneous ruling that Chevron has no right to prevent use of its trade secrets to benefit its com-

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[5] "[I]n case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle • • • is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred" (*Philadelphia Co.* v. *Stimson* (1912) 223 U.S. 605, 620; *Larson* v. *Domestic & Foreign Corp.* (1949) 337 U.S. 682, 690-691).

petitors, the Court of Appeals purported not to address the issue of whether Congress has authorized such use of pre-1970 trade secrets. However, in holding that Chevron has no right to prevent EPA's Administrator's use of pre-1970 trade secrets to benefit Chevron's competitors, the Court of Appeals ruled that Congress in 1975 had implicitly authorized such use. The Court of Appeals stated that Congress, in the 1975 amendments, "dealt rather comprehensively with the open question of retroactivity" and "at least implicitly [rejected] Chevron's position that there is a common law property right of exclusive use, absent compensation, for materials in the government's files prior to January 1, 1970" (Appx.A, pp. A-12—A-13). This directly conflicts with this Court's holding in *Mobay Chemical Corp.* v. *Costle* (1979) 439 U.S. 320 that

> "FIFRA, as amended [in 1975], does not at all address the issues of the conditions under which pre-1970 data may be used in considering another application. It *neither authorizes, forbids, nor requires* the existing agency practice with respect to pre-1970 data" (439 U.S. 320; emphasis added).[6]

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[6]In *Mobay*, the appellant had challenged the constitutionality of the 1975 amendments on the theory that they authorized the use of pre-1970 data in support of a competitor's application. A three-judge court had been convened under former 28 U.S.C. § 2282, and this Court concluded that the three-judge court had been improperly convened since Congress had not addressed that issue.

The principal issue presented by the parties to the Court of Appeals in the case at bar was whether the 1978 version (Appx. C, pp. A-63—A-66) had authorized such use of pre-1970 trade secrets. This is the issue the Court of Appeals purported not to decide, although it recognized that the 1978 amendments leave "pre-1970 data in exactly the same posture as when in *Mobay* • • • the Supreme Court considered the 1975 version" of FIFRA (Appx.A, pp. A-20—A-21).

Instead, the court below erroneously stated that in *Mobay* this Court found that "Congress chose not to prohibit" use of 1970 trade secrets (Appx.A, p. A-14).[7]

In *Youngstown Co.* v. *Sawyer* (1952) 343 U.S. 579, this Court held that the power of the executive branch of Government "must stem either from an act of Congress or from the Constitution itself" (343 U.S. 585). There is no provision of the Constitution which authorizes the action of EPA's Administrator. Thus, unless the applicable statute, FIFRA, authorizes EPA's Administrator to use pre-1970 trade secret data for the benefit of Chevron's competitors, that use is no more authorized than was the seizure of the steel mills in the *Youngstown* case.

The ruling below allows administrative agencies untrammeled discretion to use trade secret information for the benefit of the owners' competitors.

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[7]In attempting to unearth in the 1975 FIFRA amendments a Congressional intent when this Court found none, the court below may have assumed that Congress intended to provide what it omitted. But as this Court held in *Iselin* v. *United States* (1926) 270 U.S. 245:

> "• • • [it] is not a construction of a statute, but, in effect, an enlargement of it by the court [to construe it], so that what was omitted, presumably by inadvertence, may be included within its scope. *To supply omissions transcends the judicial function*" (270 U.S. 251; emphasis added).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Appendices follow)

APPENDICES

Appendix A

United States Court of Appeals
For the Third Circuit

No. 80-2037

Chevron Chemical Company,
Appellant

v.

Douglas M. Costle
(D.C. Civil No. 79-00532)

On Appeal From the United States District Court
for the District of Delaware

Argued: November 6, 1980

Before: Gibbons and Weis, *Circuit Judges* and
Whipple, *District Judge**

Opinion Filed: February 4, 1981

Amended: February 19, 1981

GIBBONS, *Circuit Judge.*

Chevron Chemical Company (Chevron) appeals from an order of the district court denying its motion for a preliminary injunction and granting the motion of the defendant, Douglas M. Costle, Administrator of the United States Environmental Protection Agency (EPA). Chevron's amended complaint alleges that EPA possesses test data submitted by it in order to obtain registration for

*Hon. Lawrence A. Whipple, United States District Judge for the District of New Jersey, sitting by designation.

sale in interstate commerce of the pesticide naled and fungicide paraquat, and seeks preliminary injunctions prohibiting that agency from using such data submitted by Chevron "before, on, or after January 1, 1970" in ruling on applications for registrations for sale of chemically identical pesticides made by other manufacturers. The district court concluded that EPA was entitled to judgment as a matter of law. We affirm, although on grounds somewhat different from those the district court relied on.

I.

More than nineteen years ago Chevron obtained patents on a pesticide, naled, and a fungicide, paraquat. Both are chemical compounds effective in controlling fungus and insect damage in agricultural products. Those patents expired in February, 1978, and thus the right to make, use and sell naled and paraquat became a part of the public domain. When the compounds were patented, however, the issuance of patents did not confer on Chevron the right to sell those compounds in interstate commerce for agricultural use. Federal law has regulated the sale in interstate commerce of agricultural fungicides and pesticides since the passage of the Insecticide Act of April 26, 1910, C. 191, 36 Stat. 335. In 1947 more stringent regulations were adopted, requiring registration of such compounds prior to sale in interstate commerce, and requiring, as a condition to registration, that the applicant submit test data to demonstrate to a federal regulatory agency the product's safety and efficacy. Federal Insecticide, Fungicide and Rodenticide Act of June 25, 1947, C. 125 § § 2-13, 61 Stat. 163-72; 7 U.S.C. § 135 et seq., *superceded by* 7 U.S.C. § 136

et seq. Originally the registration function was housed in the Department of Agriculture, and later in the Food and Drug Administration, but in 1970 that function was transferred to EPA, 35 Fed. Reg. 15623 (1970).

Beginning in 1955 and continuing to 1979, Chevron submitted to EPA and its predecessor agencies test data supporting its applications for registration of naled. Beginning in 1966 and continuing through 1980, Chevron submitted to those agencies test data supporting its application for registration of paraquat. Both were approved as safe and effective, and have been sold by Chevron and its licensees in interstate commerce in substantial quantities.

The test data submitted to the federal agencies involving the results of metabolism, toxicity, efficency [sic], and tolerance testing on plants and animals, required expenditures by Chevron in excess of $1 million, and all of it, except to the extent it was submitted to those agencies, has been maintained in confidence. Indeed, according to Chevron, development of the information required to demonstrate safety and efficacy may be more costly than the research leading to development of the patented chemical compounds. Thus, as between it and its competitors, Chevron takes steps to treat the test data as trade secrets.

Prior to October 21, 1972, the only federal statute governing treatment of submissions of confidential information to the federal government pursuant to federal regulatory schemes was the Trade Secret Act, 18 U.S.C. § 1905, which provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any

> manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operation, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Thus it can fairly be said that when, prior to October 21, 1972 Chevron submitted data in support of its naled and paraquat registrations, it did so in the expectation that its trade secrets would not be published, divulged, or disclosed. Section 1905 does not, however, deal with agency use of submitted data for its own purposes. The question of agency use did not arise with respect to the naled and paraquat data prior to 1972, however, because Chevron held patents prohibiting others from making, using or selling the compounds as agricultural fungicides or pesticides.[1]

In 1972 Congress enacted the Federal Environmental Pesticide Control Act of 1972. Pub. L. 92-516, 86 Stat. 973.

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[1]Conceivably there are registrations of common unpatentable chemicals or chemical compounds whose registrations were supported by the submission of confidential test data, but this record does not present such a case.

This legislation reenacted the registration requirements of the 1947 law and its subsequent amendments, but in the interest of environmental protection provided more stringent test data submission requirements. The lobbying battle over this legislation was intense, and among the features which aroused perhaps the most serious controversy was that embodied in section 3(c)(1)(D):

> . . . If requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, except that data submitted in support of an application shall not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless such other applicant shall have first offered to pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by section 10(b). If the parties cannot agree on the amount and method of payment, the Administrator shall make such determination and may fix such other terms and conditions as may be reasonable under the circumstances. The Administrator's determination shall be made on the record after notice and opportunity for hearing. If the owner of the test data does not agree with said determination, he may, within thirty days, take an appeal to the federal district court for the district in which he resides with respect to either the amount of the payment or the terms of payment, or both. In no event shall the amount of payment determined by the court be less than that determined by the Administrator; . . .

This section did not authorize disclosure of registrant submissions, but for the first time required that if the

agency were to consider the contents of its own files in support of another manufacturer's application for registration, it must make the new applicant pay "reasonable compensation" to the earlier applicant, whether or not the compound in question was protected by a patent. Section 3(c)(1)(D) of the 1972 Act must be read with section 10(a) of the same act, which allows an applicant to mark which part of the submitted data it considered trade secrets, and with section 10(b) which prohibits EPA from disclosing such trade secrets except as necessary to carry out its statutory duties. *See* 7 U.S.C. § 136h. The 1972 version of section 3(c)(1)(D) excludes from the use and compensation provisions all section 10(b) data.

Section 3(c)(1)(D) of the 1972 Act represents a compromise of what was originally enacted by the House of Representatives. As there proposed, the bill provided that

> . . . if requested by the Administrator, a full description of the tests made and the results thereof [shall be supplied to the EPA], except that data submitted in support of an application shall not, without the permission of the applicant be considered by the Administrator in support of any other application for registration.

H.R. 10729 § 3(c)(1)(D). H. Rep. No. 92-511, 92d Cong., 1st Sess. (1971) 17. The effect of the 1972 House Bill was to permit an initial applicant to determine on its own what it considered to be trade secrets, and to require that the Administrator abide by that determination. Thus the Administrator would have been obliged to ignore the contents of the agency files establishing that a new entrant's compound was both safe and efficacious unless

the new entrant duplicated those contents or obtained consent from the old registrant. This would have been true not only of compounds developed by the original applicant, but even of common chemicals in the public domain.

The House provision received severe criticism by some members of the House Agriculture Committee, who pointed out that it would give initial applicants a quasi-patent of indefinite duration, would present a substantial bar to entry upon the expiration of patents, and was anticompetitive.[2] Efforts to delete the exclusive use provision by amendment on the House floor were offered and defeated. 117 Cong. Rec. H. 10677-78 (Nov. 8, 1971); H. 10733-40 (Nov. 9, 1971).

In the Senate the Agriculture and Forestry Committee supported the House bill's exclusive use provision, while the Commerce Committee opposed it vigorously, proposing an amendment to strike it.[3] The latter Committee invited comments from the Department of Justice, and from academic antitrust scholars. Acting Attor-

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[2] *See* remarks of Congressman Foley, H. Rep. No. 92-511, 92d Cong. 1st Sess. (1971) at 69: remarks of Congressman Dow, *id.* at 72.

[3] The amendment of the Committee on Commerce strikes [the exclusive use] language, and allows the use of such data. Without the proposed amendment, the committee feels that barriers to entry in the pesticides industry would result which go far beyond that envisioned by our patent system. In effect, whether or not a pesticide has patent protection, a manufacturer wishing to register a pesticide previously registered would have to duplicate the required test data. As patent protection is granted to a substantial number of pesticides, this provision of the bill imposes requirements on subsequent producers beyond the licensing fees that a patent holder may

ney General Kleindienst opposed the exclusive use provision as anticompetitive,[4] as did a number of law professors.[5] EPA also criticized the exclusive use provision.[6] Responding to the criticism from the Commerce

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receive. In the extreme, a monopoly in the production of a pesticide could ensue if competitors are unable to afford the sometimes costly safety and efficacy tests.

The prime reason stated for this provision in the Agriculture Committee bill is that without it the pesticides industry will lack incentives to develop new pesticides. Yet, by requiring manufacturers to duplicate test results, portions of the money now spent on developing new pesticides will undoubtedly be diverted to perform such duplicate testing. Consequently, this provision could stifle the very incentives it seeks to achieve.

S. Rep. No. 92-970, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4096.

[4]The Acting Attorney General wrote:

In economic terms, requiring the submittal of test data imposes an expense on the first applicant to enable him to enter a given market. For others trying to enter the same market, repetition of the same tests imposes a similar entry fee. Such an entry fee, moreover, acts regressively for it is more of a burden to the small manufacturer. Duplication of such tests is a waste to the economy and a needless and undesirable burden on any subsequent applicant.

S. Rep. No. 92-970, *supra*, 1972 U.S. Code Cong. & Ad. News at 4097.

[5]*See* the criticisms on economic grounds of Professor John Stedman, S. Rep. No. 92-970, *supra*, 1972 U.S. Code Cong. & Ad. News at 4098-99, and Professor John J. Flynn, S. Rep. No. 92-970, *supra*, 1972 U.S. Code Cong. & Ad. News at 4101.

[6]EPA noted:

The effect of this provision is to afford additional economic protection, foster monopoly, and it may tend to restrict pesticide business to large manufacturers. In addition, it would increase not only federal administrative costs, but those of the manufacturer as well, aside from unnecessarily increasing the application time.

S. Rep. No. 92-970, *supra*, 1972 U.S. Code Cong. & Ad. News at 4043.

Committee and elsewhere, the Agriculture and Forestry Committee, relying heavily on a statement by the National Agricultural Chemical Association, defended the exclusive use provision as an encouragement to research toward the development of better and safer pesticides.[7] Eventually the Senate Agriculture and Forestry and Senate Commerce Committees reached the compromise reflected in section 3(c)(1)(D) quoted above. As explained in the Senate report,

> . . . it was decided that fairness and equity required a sharing of the governmentally required cost of producing the test data used in support of an application by an applicant other than the originator of such data.[8]

This compromise version survived conference committee action on the bill.[9]

The 1972 enactment did not define trade secrets. A trade secret was under section 10(a) anything an applicant wanted so to designate, unless the EPA could obtain a judgment overturning the designation. Material so designated was excepted from agency use pursuant to section 3(c)(1)(D). But absent such a designation, EPA was free to use the contents of its own files (without disclosure) in support of an application by another appli-

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[7]Report of the Committee on Agriculture & Forestry responding to Commerce Committee's proposed amendments to H.R. 10729, S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 4023, 4024-25, 4040.

[8]S. Rep. No. 92-838, *supra*, 1972 U.S. Code Cong. & Ad. News at 4092.

[9]Conf. Rep. No. 92-1540, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News, 3993, 4132.

cant so long as it required that applicant to pay "reasonable compensation."

Prior to 1972, only 18 U.S.C. § 1905 afforded federal statutory protection for the test data, and that protection was against disclosure outside the agency. Moreover, prior to 1972, the EPA was using the contents of its files, without disclosure, in the approval of me-too applications for registration.[10] In opposing enactment of section 3(c)(1)(D) after the deletion of the exclusive use provision, EPA took the position that it did not need an affirmative grant of authority to continue that practice.[11] Thus prior to 1972, neither as a matter of federal statutory law nor as a matter of agency practice was any proprietary right recognized against the government in the contents of agency files. The compromise in the 1972 Act was, therefore, a victory for the National Agricultural Chemical Association, for its effect was to prohibit agency use in approving registrations of anything designated as a trade secret, and to require payment of compensation for test data which was neither protected by a patent nor designated a trade secret. Moreover, the 1972 Act provided for judicial review of the amount of compensation only at the behest of the original submitter, not the new applicant.

The 1972 Act left major retroactivity questions unanswered: (1) whether firms which had submitted data prior to the effective date of the 1972 Act could retroac-

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[10]*See* the study by the EPA Office of Pesticide Programs, *FIFRA: Impact on the Industry*, reprinted in S. Rep. 95-334, 95th Cong., 1st Sess. 34 (1977).

[11]S. Rep. No. 92-838, *supra*, 1972 U.S. Code Cong. & Ad. News at 4043.

tively designate that data as trade secrets; (2) whether they were entitled to compensation for such previously submitted data; and (3) whether section 3(c)(1)(D) applied to new applications filed before its effective date.[12] Additionally, there was an ambiguity with respect to the effective date.[13] Nor did the 1972 Act specifically address the contention that Chevron advances in this case, that it always had a common law property right in the test data in agency files no matter when submitted, which the government could make no use of without paying compensation. We consider that contention in Part II hereafter.

These ambiguities in the 1972 legislation prompted Congress to revisit section 3(c)(1)(D) in 1975. As in 1972, there were major differences of opinion among both legislators and competing lobbyists. In section 12 of the Insecticide, Fungicide, and Rodenticide Act of 1975, Pub. L. 94-140, 89 Stat. 751, the controversial section was amended to read:

> . . . that data submitted on or after January 1, 1970, in support of an application shall not, without permission of the applicant, be considered by the Administrator in support of any other application for regis-

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[12]The retroactivity issue not surprisingly spawned litigation. *See, e.g.*, Amchem Corp. v. GAF, 391 F. Supp. 124 (N.D. Ga. 1975) (EPA may rely on test data submitted before 1972 in approving competitor's application for registration), *vacated and remanded for reconsideration in light of 1975 amendments*, 529 F.2d 1297 (5th Cir. 1976), *reinstated on rehearing*, 422 F. Supp. 340 (N.D. Ga. 1976), *aff'd in part, rev'd in part on other grounds*, 594 F.2d 470 (5th Cir. 1979).

[13]EPA in an Interim Policy Statement took the position that section 3(c)(1)(D) applied to applications submitted after November 19, 1973, 38 Fed. Reg. 31862 (Nov. 19, 1973).

> tration unless such other applicant shall have first offered to pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by section 10(b). This provision with regard to compensation for producing the test data to be relied upon shall apply with respect to all applications for registration or reregistration submitted on or after October 21, 1972. If the parties cannot agree on the amount and method of payment, the Administrator shall make such determination and may fix such other terms and conditions as may be reasonable under the circumstances. The Administrator's determination shall be made on the record after notice and opportunity for hearing. If either party does not agree with said determination, he may, within thirty days, take an appeal to the Federal district court of the district in which he resides with respect to either the amount of the payment or the terms of payment, or both. Registration shall not be delayed pending the determination of reasonable compensation between the applicants, by the Administrator or by the court.

The conference committee report describes the intended effect of the amended language to be (1) to reject a House Committee's intent that compensation be paid for data regardless of when supplied to the agency; (2) to provide for compensation only for data received after January 1, 1970, and (3) to require compensation only from new applicants filing for registration after October 21, 1972.[14] The 1975 version thus dealt rather comprehensively

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[14] New section 12 added by the Senate amended section 3(c)(1)(D) of FIFRA which requires that an applicant for registration of a pesticide pay reasonable compensation if he relies on the test data submitted by another applicant.

with the open question of retroactivity, and made access to judicial review of compensation determinations available to both sides. And while the 1975 version does not say so explicitly, at least implicitly it rejects Chevron's position that there is a common law property right of exclusive use, absent compensation, for materials in the government's files prior to January 1, 1970. That intention is confirmed by the conference committee report quoted in note 14.

> The amendment provides that only data submitted on or after October 21, 1972, is compensable; the data compensation provision applies to all applications for registration submitted on or after October 21, 1972; both parties to a dispute on compensation of data are given the same rights in the courts; and registration of a pesticide is not to be delayed pending the determination of a dispute on reasonable compensation.
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> The House bill had no specific language amending section 3(c)(1)(D). However, in the discussion of the bill on the House Floor, it was stated that it was the Committee's intent that on new registrations, the reasonable compensation data provision be applied regardless of when the data relied on was originally received by EPA. If, however, a reregistration is made of a pesticide registered originally prior to October 21, 1972, and data to support the reregistration was in the files of EPA prior to such date, no compensation would be required at the time of reregistration.
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> The Conference substitute adopts the Senate amendment with a modification which (a) provides that all data submitted in support of an application on or after January 1, 1970 (in lieu of October 21, 1972, as provided in the Senate amendment) is compensable, and (b) makes clear that the provision with regard to compensation for producing test data to be relied upon shall apply with respect to all applications for both registration and reregistration submitted on or after October 21, 1972.

House Conf. Rep. No. 94-668, 94th Cong., 2d Sess. (1975), *reprinted in* 1975 U.S. Code Cong. & Ad. News, 1359, 1380-81.

In *Mobay Chemical Corp. v. Costle*, 12 E.R.C. 1572 (W.D. Mo. 1978) (3-judge court), *appeal dismissed for lack of jurisdiction*, 439 U.S. 320 (1979), Mobay, which had submitted registration data prior to January 1, 1970, challenged the statute on the ground that as amended in 1975, section 3(c)(1)(D) authorized use by the EPA of such data without compensation, in violation of the taking clause of the fifth amendment. The three judge court dismissed the complaint and Mobay appealed directly to the Supreme Court pursuant to 28 U.S.C. § 1253. That Court dismissed the appeal, reasoning that since section 3(c)(1)(D) did not expressly authorize use of pre-1970 data, the challenge was to a longstanding agency practice, which Congress chose not to prohibit, rather than to the constitutionality of a statute. Thus, the Court held, the matter was not one within the jurisdiction of a three judge district court.[15] The *Mobay* case, therefore, tells us no more than that, in the Supreme Court's view, Congress has neither endorsed nor rejected the EPA practice of making use of its pre-January 1, 1970 files in deciding applications for new registrations.

The combination, in the 1975 version of section 3(c)(1)(D), of the cross reference to section 10(b) trade secrets, and of EPA determination of the amount of compensation subject to judicial review, produced an administrative nightmare in which the process of registering

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[15]Justice Blackmun dissented, urging that a three judge court question was presented because the 1975 version of section 3(c)(1)(D) ratified agency practice. 439 U.S. at 321.

new pesticides simply ground to a halt.[16] The result was, for all practical purposes, as complete a bar to new market entrants as if the old registrants held strong patents. Neither EPA nor the Department of Justice was happy with that situation. On the other hand, the National Agricultural Chemical Association still sought exclusive use protection. As a result of mutual government-industry dissatisfaction, in 1977 both the Senate and the House began reconsideration of section 3(c)(1)(D). EPA's principal objection to the 1975 version was the cross reference to section 10(b). Administrator Douglas M. Costle explained to the Senate Agriculture and Forestry Committee:

> By enacting the section 3(c)(1)(D) compensation mechanism, Congress wisely provided data developers the ability to recover reasonable compensation from subsequent data users. But the major pesticide developers have claimed they are also entitled to determine which applicants shall be allowed to use this data, and thus to set their own price for its use or refuse access to it altogether. Congress rejected the "exclusive use of data" concept in 1972 but the major firms have found that they can obtain "exclusive use" for some period of time simply by making very broad trade secrecy claims and engaging EPA in prolonged litigation.

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[16] *See* Letter of Administrator Douglas M. Costle to Rep. Foley, Chairman, House Agriculture Committee, *reprinted in* H.R. Rep. No. 95-663, 95th Cong., 1st Sess. 53 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News at 2026; Remarks of Rep. Fithian, 123 Cong. Rec. H. 11864 (Oct. 31, 1977); Remarks of Sen. Leahy, Chairman, Senate Agriculture, Nutrition and Forestry Committee, 124 Cong. Rec. S. 15303 (Sept. 18, 1978).

> If Congress desires EPA to implement a truly mandatory data licensing program through the section 3(c)(1)(D) mechanism, and desires to encourage competition and access to the marketplace for registrants who do not develop their own data, the reference to section 10 should be stricken from section (3)(c)(1)(D). The result will be that all data can be licensed whether or not it is trade secret.

Statement of April 27, 1977, in S. Rep. No. 95-334, accompanying S. 1678, 95th Cong., 1st Sess., at 70-71 (1977).[17] The Justice Department strongly supported the EPA evaluation of the anti-competitive impacts of the cross reference to section 10(b).[18] As spokesman for the pesticide manufacturers, the National Agricultural Chemical Manufacturers Association not only opposed the EPA proposal, but sought an amendment granting, for all registration data produced by a registrant, trade secret or otherwise,

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[17]*See* similarly, Statement of Hon. Douglas Costle before Senate Subcommittee on Agricultural Research and General Legislation, Jan. 9, 1977 in S. Rep. No. 95-334, accompanying S. 1678, 95th Cong., 1st Sess., at 80 (1977). For a more detailed explanation of the EPA views, *see EPA Study, Economic Impacts of Proposed Amendments to FIFRA*, in S. Rep. No. 95-334, *supra*, at 59-64.

[18]Assistant Attorney General Patricia Wald wrote:

> The Department of Justice supports the EPA's evaluation and conclusions with respect to the direct and indirect anticompetitive effects of the trade secret provisions of Section 10 of FIFRA. We concur with EPA that some expression of Congressional intent would be desirable to support the Agency's position on the issues relating to competition in the pesticide industry.
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> It should be noted that the EPA raises two separate issues: (1) the access to or reliance upon safety efficacy, and environmental chemistry data ("test data"), without actual disclosure, which has been furnished to EPA by developers, and (2) the

a ten year exclusive use protection.[19] The Senate passed a version of an amended section 3(c)(1)(D) which for the most part adopted the position of the government agencies. That version omitted the trade secret reference, rejected the exclusive use provision, and limited compensation to a period of seven years after registration.[20] The seven year period made it unlikely that protection of test data would outlast patent protection, although it still conferred a boon on registrants of unpatentable compounds.

In the House, the National Agricultural Chemical Manufacturers Association was more successful than EPA and the Department of Justice. Despite EPA opposition, the House Agriculture Committee proposed H.R. No. 8681, which would have granted a five year exclusive right, followed by a five year compensation right, with compensa-

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public disclosure of such data. The Department believes that the competitive issues hinge principally on the ability of applicants to use such test data to satisfy registration requirements.

. . .

The Antitrust Division's letter to Mr. Johnson delineates its views concerning sections 3(c)(1)(D) and 10. The Division's letter concludes that the scope of the trade secret provisions of FIFRA may have been improperly extended in denying potential competitors access to test data prepared by developers. We agree with the position of EPA that "trade secret status should be routinely extended only to truly secret information concerning manufacturing processes." . . .

S. Rep. No. 95-334, *supra*, at 89-90.

[19]S. Rep. No. 95-334, *supra*, at 95.

[20]The text of the Senate version is in S. Rep. 95-334, *supra*, at 129-30. The EPA position was set forth not only in the EPA study referred to in note 17, *supra*, but in a letter from Administrator Costle to the Chairman of the House Agriculture Committee. *See* H.R. Rep. No. 95-663, 95th Cong., 1st Sess. at 53-54 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News, 1966, 2026-27.

tion to be determined by binding arbitration.[21] The House passed H.R. No. 8681 in October 1977, 123 Cong. Rec. H. 11864 (Oct. 31, 1977), and the following September a compromise on the competing bills emerged from a Conference Committee, which agreed on the current version of section 3(c)(1)(D), quoted in the margin.[22]

The conference report summarizes the substitute provision:

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[21]*See* H. R. Rep. No. 95-663, supra, at 18-19, 1978 U.S. Code Cong. & Ad. News at 1991.

[22]As finally enacted, section 3(c)(1)(D) of 1978 provides:

> (D) except as otherwise provided in subsection (c)(2)(D) of this section, if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions:
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> (1) With respect to pesticides containing active ingredients that are initially registered under this Act after the date of enactment of the Federal Pesticide Act of 1978, data submitted to support the application for the original registration of the pesticide, or an application for an amendment adding any new use to the registration and that pertains solely to such new use, shall not, without the written permission of the original data submitter, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide: *Provided,* That such permission shall not be required in the case of defensive data:
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> (ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for reregistration, the Administrator may with-

(1) all test data submitted after December 31, 1969, will be compensable for a period of 15 years from the date the data are submitted:

(2) in the case of pesticides registered after the date of enactment of this provision, there will be a

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out the permission of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the 'applicant') within the fifteen-year period following the date the data were originally submitted only if the applicant has made an offer to the Administrator accompanied by evidence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation, nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. The parties to the arbitration shall share equally in the payment of the fee and expense of the arbitrator. If the Administrator determines that an original data submitter has failed to participate in a procedure for reaching an agreement or in an ar-

period of exclusive use for data submitted in support of the registration of a product containing a new active ingredient running for 10 years from the date the product is registered, except that there will be no exclusive use for defensive data; and

(3) there will be a period of exclusive use for data submitted in support of the new use registration of a product equal to the time of exclusivity remaining under any 10-year exclusive use period of the product.

House Conf. Rep. No. 95-1560, 95th Cong., 2d Sess. 30 (1978). The 1978 version retained the Senate proposal for the exclusive remedy of determination of compensation by binding arbitration, as well as the Senate proposal to eliminate the cross reference to section 10(b), which had permitted the initial registrant to exclude materials from agency use merely by calling them trade secrets. And in the end, Congress retained the January 1, 1970 cut-off date for statutory protection, leaving pre-1970 data in exactly the same posture as when in *Mobay Chemical Company v. Costle*, 439 U.S. 320 (1979), the Supreme Court considered

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bitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the original data submitter shall forfeit the right to compensation for the use of the data in support of the application. Notwithstanding any other provision of this Act, if the Administrator determines that an applicant has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the Administrator shall deny the application or cancel the registration of the pesticide in

the 1975 version of section 3(c)(1)(D); that is, subject to the agency practice of consulting its files when passing on new applications for registration. Moreover, as with the 1975 law, the refusal of Congress in 1978 to extend the compensation provisions of section 3(c)(1)(D) to pre-1970 file data is at least an implicit rejection of the industry's position that it has a proprietary interest in that data for which compensation ought to be paid.

II.

Chevron challenges the constitutionality both of the agency practice of making internal agency use of pre-January 1, 1970 data and of the use and compensation scheme set forth in the 1978 version of section

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support of which the data were used without further hearing. Before the Administrator takes action under either of the preceding two sentences, the Administrator shall furnish to the affected person, by certified mail, notice of intent to take action and allow fifteen days from the date of delivery of the notice for the affected person to respond. If a registration is denied or canceled under this subparagraph, the Administrator may make such order as the Administrator deems appropriate concerning the continued sale and use of existing stocks of such pesticide. Registration action by the Administrator shall not be delayed pending the fixing of compensation:

(iii) After expiration of any period of exclusive use and any period for which compensation is required for the use of an item of data under subparagraphs (D)(i) and (D)(ii) of this paragraph, the Administrator may consider such item of data in support of an application by any other applicant without the permission of the original data submitter and without an offer having been received to compensate the original data submitter for the use of such item of data; . . .

7 U.S.C.A. §136a (c)(1)(D) (1978).

3(c)(1)(D).[23] It urges that agency use of its pre-1970 data is an uncompensated taking in violation of the taking clause of the fifth amendment. As to the post-1970 data, it contends:

1. that agency use of the data in order to permit registrations by third parties is a taking for private rather than public purposes in violation of due process. *See Thompson v. Consolidated Gas & Utilities Corp.*, 300 U.S. 55 (1937);

2. that even if the taking is authorized, the binding arbitration provision in the 1978 version, an exclusive remedy, deprives it of any opportunity for a judicial determination of just compensation.

Appellant's Brief at 24-33. The district court rejected these contentions, and we reject them as well, although for reasons differing somewhat from those relied upon by that court.

A.

Fundamental to all of Chevron's contentions is its assertion of a property right in the contents of the EPA files insofar as those files contain test data submitted by Chevron in its applications for registration. Before we undertake to explore the intriguing constitutional law issues Chevron tenders, it is appropriate to examine the threshold question whether there is such a property right. In its absence there is no need for a constitutional inquiry. *Cf. Hagans v. Lavine*, 415 U.S. 528, 543-5 (1974); *Siler*

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[23]The complaint was filed after the effective date of section 7 of Pub. L. 94-381, amending 28 U.S.C. § 2284. Thus both the challenge to EPA practice and the challenge to the constitutionality of section 3(c)(1)(D) were properly heard by a single district judge.

v. Louisville & Nashville R. Co., 213 U.S. 175, 193 (1909). In several recent cases, the Supreme Court has said that in determining whether federal due process protections apply, we must first find an entitlement created by some law.[24] *Paul v. Davis*, 424 U.S. 693 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976); *Montayne v. Haymes*, 427 U.S. 236 (1976). Both here and in the district court Chevron has assumed more than it has explained the source of the property right it claims. It does rely on the "common law of trade secrets," but if we may borrow Justice Holmes' often misused aphorism, "[t]he common law is not a brooding omnipresence in the sky but the articulable voice of some sovereign or quasi-sovereign that can be identified. . . ."[25]

Federal protection of intellectual property is statutory, although not necessarily preemptive of state law. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Kewanee Oil Co. v. Bicron*, 416 U.S. 470 (1974); *Goldstein v. California*, 412 U.S. 546 (1973). Those recent authorities recognizing a common law of intellectual property not preempted by federal statutes, all are consistent with the Court's analysis in *Paul v. Davis*, *Meachum v. Fano* and *Montayne v. Haymes*, *supra*, in looking to the law of some state for the property interest in question. Since 1972, section 3(c)(1)(D) has in one form or another conferred a federal expectation—a property right— in some

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[24]*But see* Meachum v. Fano, 427 U.S. 215, 229-35 (1976) (Stevens, J., dissenting).

[25]Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917), (Holmes, J., dissenting). The aphorism is more appropriate to this case than to that federal admiralty case. *See* Moragne v. States Marine Lines, 398 U.S. 375 (1970).

data submitted to EPA. But prior to the enactment of Pub. L. 92-516, the only federal statute to which we have been referred that appears at all relevant is 18 U.S.C. § 1905. That statute does not confer a private cause of action, although it may provide a standard by which to judge the legality of proposed agency disclosures. *Chrysler Corp. v. Brown,* 441 U.S. 281, 316-17 (1979). At best it can be construed to create a federal law right of nondisclosure, not of non-use by the agency. Aside from section 3(c)(1)(D), Chevron has shown us no federal statute preventing internal agency use of the contents of files compiled in the performance of the agency's statutory functions.[26]

Absent a federal law property interest, then, two questions remain. The first is whether the law of any state having any interest in Chevron purports to confer on it a state law property interest in materials Chevron has voluntarily turned over to a federal regulatory agency in order to obtain a license to sell a product in interstate commerce. The second is whether, assuming a state law purports to do so, such a law is valid when asserted against the federal agency.

As to the first question, we note that neither in Chevron's initial brief nor in its reply brief is *any* state law referred to. The initial brief does rely on Restatement, Torts (1939) § 757, which we may safely assume reflects the law of some relevant state. But that statement of the law affords no help since it deals with liability for disclosure of trade

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[26] *Cf.* 21 C.F.R. § 314.1(b) (1980) prohibiting FDA use of agency files to register *new* drug compounds without original registrant's permission.

secrets without a privilege to do so. EPA does not propose disclosure. Nor did EPA or its predecessor agencies obtain the material in its files by any improper means, or for the purpose of advancing the business of Chevron's competitors. *Compare* Restatement, Torts (1939) § 759. It is true that the material was submitted to the federal government with some expectation of confidentiality. Prior to 1972, however, 18 U.S.C. § 1905 and agency practice defined the scope of that expectation, and since 1972 the several versions of section 3(c)(1)(D) have done so.[27] None of those statutes could reasonably have been the source of an expectation of general agency non-use. *Cf. Mobay Chemical Corp. v. Costle,* 439 U.S. 320 (1979). Thus we find nothing in the Restatement of Torts provisions on trade secrets from which, against EPA's internal use, Chevron can take comfort. Moreover, our own researches have produced no state law suggesting a continuing property interest, beyond that provided by federal law, applicable to material furnished to a federal agency as a precondition to selling a product in interstate commerce.[28]

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[27]Section 10 of the Act, 7 U.S.C.A. § 136h(d) (1978) now authorizes EPA disclosure in certain instances, and to that extent pro tanto limits the applicability of 18 U.S.C. § 1905. Chevron does not in this action directly challenge the authorized disclosure provisions of section 10.

[28]Indeed the only relevant decision our researches have uncovered supports our analysis. In Earthline Corp. v. Mauzy, Acting Director, Illinois Environmental Protection Agency, 68 Ill.App.3d 304, 385 N.E.2d 928 (1979), a unanimous Illinois appellate court held state trade secret law did not prevent the state EPA Director from disclosing to the state attorney general trade secrets voluntarily submitted under the state EPA's licensing requirements, when disclosure was necessary to enforce environmental protection laws.

That is not to say that Chevron's test data, while it remained exclusively in Chevron's hands, was not protected by state law. Obviously it was, and obviously Chevron was perfectly free to keep it in that state. But it could not do so and at the same time market naled and paraquat in interstate commerce.

We think, moreover, that the recognition of a role for state law in defining the degree of confidentiality in which federal agencies must keep information submitted to them in connection with the discharge of their federal regulatory responsibilities presents the possibility of conflicting state laws imposing conflicting agency responsibilities in different parts of the country. Thus even if there were any state law purporting to protect the confidentiality of data voluntarily submitted to a federal regulator, there is some doubt that it would survive supremacy clause scrutiny. This second question need not, however, be decided, because we find no such state law.

The Illinois court further observed that the Illinois Environmental Protection Act, Ill. Rev. Stat. 1977 Ch. 111½, Par. 1007(B)(II), "states that information submitted concerning persons subject to certain Federal regulatory permit requirements 'may be disclosed or transmitted to other officers, employees or authorized representatives of this state or of the United States concerned with or for the purpose of carrying out this Act.'" 69 Ill.App.3d at 308, 385 N.E.2d at 930. The court found that because "the business in question is, in effect, licensed and the documents sought to be disclosed [to the attorney general] are permits containing information voluntarily given in order to obtain the permit," 69 Ill.App.3d at 309, 385 N.E.2d at 931, and because the attorney general was acting at the EPA's behest, trade secret protection must yield to the effectuation of environmental laws.

B.

The district court assumed, at least arguendo, that Chevron had a property interest in its submitted data. On that assumption the court went on to reject Chevron's constitutional challenges.

The court, noting that important benefits derive to the public from me-too registrations, held that there was no merit to the contention that use of the file data to dispose of me-too registrations was a taking of private property for private rather than public purposes. These benefits include administrative cost savings, time saving in the registration process, and competitive benefits in the marketplace from the encouragement of entry by newer and smaller producers. Those factual determinations are not disputed. They, together with our legal conclusion in Part II A. above, make it unnecessary for us to consider whether, as EPA contends, the authority of *Thompson v. Consolidated Gas & Utilities Corp.*, 300 U.S. 55 (1937), has been undermined by subsequent cases such as *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940), and *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950).

The district court also rejected the contention that the compulsory arbitration provision in section 3(c)(1)(D) deprives Chevron of the opportunity for a judicial determination of just compensation. In support of this ruling the court relied on the *Regional Rail Reorganization Cases*, 419 U.S. 102, 126 (1974), holding that for any taking, a Tucker Act remedy remains available unless by legislation Congress has explicitly withdrawn it. While we express no

disagreement with the court's interpretation of the *Regional Rail Reorganization Cases*, we need not decide whether a Tucker Act remedy would in other circumstances be available for agency use of the contents of agency files. In this instance, since we find no protected property interest beyond that conferred in 18 U.S.C. § 1905 and in section 3(c)(1)(D) of the Pesticide Act, there has been no taking for which such a remedy is needed.[29]

III.

The order denying a preliminary injunction and dismissing the complaint will be affirmed.

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[29]Moreover, although Chevron has had, since 1975, a property right in data submitted after December 31, 1969, our determination that no property right subsisted before the 1972 and subsequent amendments to the Pesticide Act, also leads us to conclude that Congress, having conferred a property right to which the chemical companies had no prior claim, may condition that right to accommodate agency practice. *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974).

United States Court of Appeals
For the Third Circuit

No. 80-2037

Chevron Chemical Company, a corporation,
Appellant

vs.

Douglas M. Costle, Administrator,
United States Environmental Protection Agency

(D.C. Civil No. 79-00532)

On Appeal from the United States District Court
for the District of Delaware

Present: Gibbons and Weis, *Circuit Judges* and
Whipple, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on November 6, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 5, 1980, be, and the same is hereby affirmed. Costs taxed against appellant.

Attest:

/s/ SALLY MRVOS
Clerk

February 4, 1981

*Honorable Lawrence A. Whipple, United States District Judge for the District of New Jersey, sitting by designation.

Appendix B

In the United States District Court
for the District of Delaware

Civil Action No. 79-532

Chevron Chemical Company,
a corporation,
Plaintiff,

v.

Douglas M. Costle, Administrator,
United States Environmental Protection
Agency,
Defendant.

Dated: June 5, 1980
Wilmington, Delaware

SCHWARTZ, District Judge

This dispute between plaintiff Chevron Chemical Company ("Chevron") and defendant Douglas M. Costle, Administrator of the United States Environmental Protection Agency ("EPA"), arises out of EPA's intended use of Chevron's test data to support pesticide registration applications of certain of Chevron's competitors. Presently before the Court are Chevron's application for a preliminary injunction and EPA's motion for summary judgment. The factual and statutory background of this controversy follows.

I

BACKGROUND

Federal regulation of the manufacture and sale of pesticides began in 1947 with the enactment of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 135 *et seq.* Administration of FIFRA was transferred in December, 1970 from the U.S. Department of Agriculture to EPA. FIFRA mandated the registration of every pesticide marketed in interstate, though not intrastate, commerce. In order to obtain a registration, the applicant was required to demonstrate the safety and efficacy of the pesticide product through the submission, *inter alia*, of research and test data. The obtaining of this data often entailed considerable expense, and much of it consisted of trade secret or otherwise confidential information.

FIFRA was amended in 1972 by Section 2 of the Federal Environmental Pesticide Control Act ("FEPCA"), Pub. L. 92-516, 92d Cong., 2d Sess. (Oct. 21, 1972), 86 Stat. 973. As relevant to this action, Section 3 of the 1972 Act, 7 U.S.C. § 136a, provided that data submitted in support of an application should not, without the permission of the applicant, be considered by the EPA Administrator in support of any other application for registration unless the subsequent applicant had first offered to pay reasonable compensation to the original applicant for producing the test data to be relied upon and the data did not contain or relate to trade secrets.[1] Significantly, the 1972 Act

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[1]Section 3(c)(1)(D) of FIFRA of 1972 required the submission of a statement which included:

did not expressly indicate whether the restrictions on the Administrator's use of the data and the required compensation provisions applied to all test data ever submitted in support of a registration application, or merely to data submitted after the effective date of the 1972 Act, and litigation on that issue ensued.

FIFRA was amended in 1975 in an effort to clarify this issue. As amended, Section 3(c)(1)(D)[2] of FIFRA restricted the use by the Administrator of non-trade secret

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(D) if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, except that data submitted in support of an application shall not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless such other applicant shall have first offered to pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by section 10(b). If the parties cannot agree on the amount and method of payment, the Administrator shall make such determination and may fix such other terms and conditions as may be reasonable under the circumstances. The Administrator's determination shall be made on the record after notice and opportunity for hearing. If the owner of the test data does not agree with said determination, he may, within thirty days, take an appeal to the federal district court for the district in which he resides with respect to either the amount of the payment or the terms of payment, or both. In no event shall the amount of payment determined by the court be less than that determined by the Administrator; . . . .

[2]Section 3(c)(1)(D) of FIFRA of 1975 required the submission of a statement which included:

(D) if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, except that data submitted on or after January 1, 1970, in support of an application shall not, without per-

test data originally submitted *on or after January 1, 1970.* Such data could not be used without the permission of the original data submitter to support a subsequent application made on or after October 21, 1972 unless the subsequent applicant offered to pay reasonable compensation to the original data submitter. EPA considered itself free to use, and did use, data submitted prior to 1970 without the submitter's consent and without an offer of compensation having been made. In light of this construction of the statute, the constitutionality of the 1975 Act was challenged before a three-judge District Court under then

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mission of the applicant, be considered by the Administrator in support of any other application for registration unless such other applicant shall have first offered to pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by section 10(b). This provision with regard to compensation for producing the test data to be relied upon shall apply with respect to all applications for registration or reregistration submitted on or after October 21, 1972. If the parties cannot agree on the amount and method of payment, the Administrator shall make such determination and may fix such other terms and conditions as may be reasonable under the circumstances. The Administrator's determination shall be made on the record after notice and opportunity for hearing. If either party does not agree with said determination, he may, within thirty days, take an appeal to the Federal district court for the district in which he resides with respect to either the amount of the payment or the terms of payment, or both. Registration shall not be delayed pending the determination of reasonable compensation between the applicants, by the Administrator or by the court.

28 U.S.C. § 2282. *Mobay Chemical Corp. v. Costle*, 12 E.R.C. 1572 (W.D. Mo. 1978). The three-judge court adopted EPA's construction of the statute, 12 E.R.C. at 1574, and upheld the constitutionality of the statute. On appeal, the Supreme Court rejected the lower court's interpretation of the statute and dismissed the appeal for want of jurisdiction.

> [W]hatever may be true with respect to data submitted after January 1, 1970, the FIFRA, as amended, does not at all address the issues of the conditions under which pre-1970 data may be used in considering another application. It neither authorizes, forbids, nor requires the existing agency practice with respect to pre-1970 data. As a legal matter, then, appellant's attack is on agency practice, not on the statute. The three-judge court was thus improperly convened . . . and this Court does not have jurisdiction to entertain a direct appeal from the judgment in such case.

Mobay Chemical Corp. v. Costle, 439 U.S. 320, 320-21 (1979) (citations omitted).

The Supreme Court's opinion in *Mobay*, construing the 1975 amendments to FIFRA, was issued on January 8, 1979. Several months earlier, in September, 1978, Congress once again had amended FIFRA by enacting the provisions governing the instant litigation, Pub. L. 95-396, 95th Cong., 2d Sess. (Sept. 30, 1978), 92 Stat. 820. The 1978 amendments eliminated the prohibition against consideration by EPA of any test data classified as trade secrets. By its terms the 1978 Act also established at least

two, and perhaps three, categories of test data available for consideration by EPA under varying conditions.[3] With

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[3]Section 3(c)(1)(D) of FIFRA of 1978 requires the submission of a statement which includes:

> (D) except as otherwise provided in subsection (c)(2)(D) of this section, if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions:
>
> (i) With respect to pesticides containing active ingredients that are initially registered under this Act after the date of enactment of the Federal Pesticide Act of 1978, data submitted to support the application for the original registration of the pesticide, or an application for an amendment adding any new use to the registration and that pertains solely to such new use, shall not, without the written permission of the original data submitter, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide: *Provided*, That such permission shall not be required in the case of defensive data;
>
> (ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for registration, the Administrator may, without the permission of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the 'applicant') within the fifteen-year period following the date the data were originally submitted only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator accompanied by evi-

respect to data submitted to support a registration application initially granted after September 30, 1978 ("post-1978 data"), the Administrator may not consider such data

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dence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation, nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. The parties to the arbitration shall share equally in the payment of the fee and expense of the arbitrator. If the Administrator determines that an original data submitter has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the original data submitter shall forfeit the right to compensation for the use of the data in support of the application. Notwithstanding any other provision of this Act, if the Administrator determines that an applicant has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required

to support an application by another person, without the permission of the original data submitter, for a period of ten years following the initial registration. Thus, data submitters are entitled to a ten-year period of exclusive use for post-1978 data. 7 U.S.C. § 136(a)(1)(D)(i). With respect to data submitted after December 31, 1969 ("post-1969 data"), the Administrator may consider such data to support an application by another person, without the permission of the original data submitter, for a period of fifteen years following submission of the data only if the subsequent applicant has offered to compensate the original data submitter. Disputes as to compensation are sub-

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by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the Administrator shall deny the application or cancel the registration of the pesticide in support of which the data were used without further hearing. Before the Administrator takes action under either of the preceding two sentences, the Administrator shall furnish to the affected person, by certified mail, notice of intent to take action and allow fifteen days from the date of delivery of the notice for the affected person to respond. If a registration is denied or canceled under this subparagraph, the Administrator may make such order as the Administrator deems appropriate concerning the continued sale and use of existing stocks of such pesticide. Registration action by the Administrator shall not be delayed pending the fixing of compensation;

(iii) After expiration of any period of exclusive use and any period for which compensation is required for the use of an item of data under subparagraphs (D)(i) and (D)(ii) of this paragraph, the Administrator may consider such item of data in support of an application by any other applicant without the permission of the original data submitter and without an offer having been received to compensate the original data submitter for the use of such item of data; . . . .

mitted to binding arbitration, unreviewable by any court absent fraud or misrepresentation. An original data submitter who refuses to participate in an arbitration proceeding forfeits the right to compensation. Thus, data submitters are entitled to a fifteen-year period of compensation for use of post-1969 data. 7 U.S.C. § 136a(c)(1)(D)(ii). Data submitted after 1978, for which ten years of exclusive use is assured, also receives five years of compensation upon expiration of the exclusive use period. The section of the statute potentially creating a third category of data reads:

> (iii) after expiration of any period of exclusive use and any period for which compensation is required for the use of an item of data under subparagraphs (D)(i) and (D)(ii) of this paragraph, the Administrator may consider such item of data in support of an application by any other applicant without the permission of the original data submitter and without an offer having been received to compensate the original data submitter for the use of such item of data;

7 U.S.C. § 136a(c)(1)(D)(iii). EPA contends that Congress enacted a comprehensive scheme whereby the newest data is afforded the greatest protection—exclusive use—and the oldest data is afforded the least protection—unrestricted use by the Administrator of all data submitted before January 1, 1970 ("pre-1970 data"). Chevron argues that the quoted language merely authorizes unrestricted use of data in the first two categories once the applicable time period has expired, and does not authorize consideration of pre-1970 data.

Within this complicated statutory framework, the facts giving rise to this dispute are relatively simple. Beginning in 1955, Chevron supplied EPA or its predecessor agencies with test data to support its registration applications for the pesticide "naled," marketed by Chevron under the trademark of DIBROM. This test data was otherwise kept confidential by Chevron, and EPA concedes that it includes trade secrets. Beginning in 1966, Chevron also supplied EPA or its predecessor agencies with test data to support its registration applications for a chemical compound known as "paraquat." This test data similarly was kept confidential and includes trade secrets. Chevron contends, and the Court accepts for purposes of these motions, that compilation of the naled and paraquat data cost several million dollars, and that duplication of the data by a competitor "would require scientific and technical know-how believed to be possessed only by Chevron."

The patents on naled and paraquat expired in February, 1978. A number of Chevron's competitors are seeking to market naled and paraquat products and accordingly have submitted registration applications to EPA. These firms have offered to compensate Chevron for the use by EPA of Chevron's post-1969 data, but have offered no compensation for pre-1970 data. EPA intends to rely on Chevron's pre-1970 and post-1969 data in support of these applications, and if such reliance is permitted, will issue registrations to one or more of Chevron's competitors.

The extent of the Administrator's "use" of Chevron's data requires some explanation. EPA does not physically deliver the data to Chevron's competitors, does not make

the data available for inspection by them, and does not disclose the contents of the data to them under the statutory provisions challenged here. Rather, EPA reexamines the data previously supplied to it by Chevron to assure itself of the safety and efficacy of the competitor's similar or identical products.

In support of its motion for a preliminary injunction, Chevron contends that the Administrator's use of Chevron's data for the benefit of Chevron's competitors constitutes a "taking" of Chevron's property under the fifth amendment. This taking may be enjoined, it is argued, because FIFRA, as amended, does not authorize the Administrator's use of pre-1970 data, the taking is for a private rather than a public purpose, and the statutory compensation provisions calling for binding arbitration unconstitutionally preclude a judicial determination of "just compensation." In addition, the statute is said to violate Chevron's right to due process in that it acts retroactively to divest Chevron of its trade secret property.

In response to Chevron's arguments and in support of its own motion for summary judgment, EPA contends that any taking involved here may not be enjoined because such taking is authorized by the statute, is for a public purpose, and a monetary remedy is available to Chevron in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491. Alternatively, EPA argues that the Administrator's mere reliance on Chevron's data does not constitute a taking under the fifth amendment. Finally, EPA asserts the statute's application is not retroactive and does not otherwise offend due process considerations.

Chevron is not before the Court seeking damages or other monetary compensation from the United States or EPA as a result of a taking of its property. If EPA's use of Chevron's data is permitted to proceed, a result which necessarily recognizes the availability of a Tucker Act remedy, Chevron's claim for such relief must be brought in the Court of Claims. A ruling by this Court on the issue of whether EPA's use of the data does constitute a taking under the fifth amendment would bar relitigation of that question there. *See Advertising Checking Bureau, Inc. v. United States,* 159 F. Supp. 330, 332-33 (Ct. Cl. 1958). *Accord, Carney v. United States,* 462 F.2d 1142, 1145 (Ct. Cl. 1972); *Clement v. United States,* 140 F. Supp. 573, 574 (Ct. Cl. 1956). In light of the disposition of the issues, which follows, it is unnecessary for this Court to reach the taking question. Accordingly, the Court follows the example of the Supreme Court in *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 94 n.39 (1978), and offers no view on that issue. *See also Pennsylvania v. Interstate Commerce Commission,* 535 F.2d 91, 97 (D.C. Cir.), *cert. denied,* 429 U.S. 834 (1976).

II

AUTHORIZATION FOR USE OF PRE-1970 DATA

The threshold issue facing the Court is whether the statute does or does not authorize consideration of pre-1970 data. In construing § 3(c)(1)(D) of FIFRA, the starting point, of course, is the literal language of the statute, although the inquiry need not end there.

Subparagraphs (i) and (ii) of § 3(c)(1)(D) respectively provide for a period of exclusive use for very recent (post-1978) data and a period of compensation for less recent (post-1969) data. Subparagraph (iii) then authorizes unrestricted use of data by the Administrator "after expiration of any period of exclusive use and any period for which compensation is required for the use of an item of data under subparagraphs (D)(i) and (D)(ii) of this paragraph. . . ." Chevron urges that subparagraph (iii) merely specifies the treatment to be accorded data from subparagraphs (i) and (ii) once the period of statutory protection has run out and, like the 1975 amendments to FIFRA construed in *Mobay, supra,* is silent as to pre-1970 data. EPA argues that since pre-1970 data is not subject to a period of exclusive use under subparagraph (i) and is not subject to the compensation period specified in subparagraph (ii), those periods must be considered to have "expired" under subparagraph (iii) as to pre-1970 data.

Plainly, the literal language of the statute does not expressly reference pre-1970 data, either by authorizing or prohibiting use of it by the Administrator. Read in isolation, subparagraph (iii) favors the interpretation ascribed to it by Chevron. However, that interpretation appears to be "at variance with the policy of the legislation as a whole," justifying and perhaps requiring reliance upon aids to construction over the literal words of the legislation. *See United States v. American Trucking Associations, Inc.,* 310 U.S. 534, 543-44 (1940).

EPA has offered a number of items having questionable value as legislative history, such as testimony and correspondence by industry witnesses and *post hoc* Congressional committee statements,[4] in an effort to demonstrate Congress' expressed intent to authorize unrestricted use of pre-1970 data. In fact, the competent legislative history of the 1978 amendments offers no clear-cut, unambiguous statement in a committee report, conference report, or by an individual legislator specifically addressing the permissible uses of pre-1970 data.

A rather straightforward argument, appealing in its simplicity, can be made to support the view that pre-1970 data is not governed by the provisions of the 1978 amendments: The Supreme Court's ruling in *Mobay* established that the 1975 Act neither authorized, forbade nor required consideration of pre-1970 data. The 1978 amendments contain no express reference to that issue. Therefore, the status quo was maintained with respect to pre-1970 data. Nevertheless, a more detailed examination of the legislative scheme militates against adoption of this view, although the issue is hardly free from doubt.

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[4]A January, 1979 "Committee Print," prepared "for the use of the [Senate] Committee on Agriculture, Nutrition, and Forestry," contains a section-by-section analysis of the 1978 amendments to FIFRA. The discussion of § 3(c)(1)(D) states at page 138:

> Data submitted prior to December 31, 1969, may be considered in support of subsequent applications to which they pertain without applicants incurring any obligation to pay compensation or to seek the permission of the original data submitter.

This passage, while directly on point, appears in a document issued four months after enactment of the legislation.

Had *Mobay* issued prior to the enactment of these amendments, the absence of any express reference to pre-1970 data might well have proved fatal to EPA's position. Inasmuch as the 1978 amendments preceded the January 8, 1979 Opinion, however, the failure by Congress to discuss and expressly resolve the issue created by that ruling becomes more understandable. Legislative intent must therefore be gleaned from an examination of the fault to be corrected and the method employed to accomplish the Congressional goal. *See Warner v. Goltra,* 293 U.S. 155, 158 (1934).

The report of the Senate Committee on Agriculture, Nutrition, and Forestry accompanying S. 1678, the Senate forerunner of the 1978 amendments, describes a registration process that had "ground to a virtual halt." S.Rep. No. 95-334, 95th Cong., 1st Sess. (1977) at 3.

> Beyond the problems cited above, the most serious problem in the current program is the logjam of litigation that resulted from controversies over data compensation and trade secret protection.
>
> The lack of clarity of sections 3(c)(1)(D) and 10(b) of FIFRA has not only snagged the registration process; it is impacting on the structure of the industry. The Environmental Protection Agency has suggested that these two provisions are resulting in a contraction in the industry, and the Department of Justice has indicated that the provisions in present law are "needlessly anti-competitive."

> Those concerns are detailed in the EPA study entitled "FIFRA: Impact on the Industry" and in the Department of Justice views which are included in this report.

Id. The EPA study, cited with seeming approval in the Committee's report, described the existing statutory provisions as follows:

> In 1975, § 3(c)(1)(D) was amended to provide that the limitations it placed on the Administrator's consideration of data did not apply to data received by EPA (or its predecessors) before 1970.

Id. at 39. Of course, EPA's interpretation of the 1975 Act subsequently was invalidated in *Mobay*. Nonetheless, at the time the 1978 amendments were under consideration, Congress may well have accepted EPA's conclusion as accurate and determined that there was no need to address further the issue of pre-1970 data.

This view finds support elsewhere in the legislative history. Repeated references are made to the artificial extension of patent rights on chemicals that grew out of the 1972 and 1975 versions of FIFRA. Patents vest the patentee with certain monopolistic rights for a period of 17 years in exchange for public disclosure of the methods, processes and ingredients used to produce the product. Ordinarily, competitors are free to use this information upon expiration of the 17-year period to produce and market the same product. In the case of patented pesticides, registration

through proof of safety and efficacy is a prerequisite to marketability. Upon expiration of a pesticide patent, a competitor who is unable to duplicate the test data submitted by the patentee and original registrant cannot obtain a registration from EPA to market the pesticides, and the monopoly power associated with patent rights arguably is extended beyond the statutory 17-year period.

The 1975 amendments to FIFRA, as construed in *Mobay,* did not authorize consideration of any test data without the permission of or payment of compensation to the original data submitter. The periods of exclusive use for trade secrets and of mandatory compensation for other data submitted on or after January 1, 1970 extended in perpetuity. The 1978 amendments effected a significant change in this regard. Section 3(c)(1)(D)(iii) establishes that as to data for which the periods of statutory protections have expired, including trade secret data, the Administrator's authority to consider the date is unfettered. Since no such unfettered authority was permitted by the earlier statutes, the inquiry must focus on the breadth of this grant of authority.

The report of the Senate Agriculture Committee on S. 1678,[5] which called for a seven year period of mandatory

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[5]While the Senate bill's deletion of the January 1, 1970 cutoff date ultimately was rejected in conference, S. 1678 is significant here because it, like the conference bill actually adopted, provided that certain data was available for unrestricted consideration upon expiration of a period of statutory protection.

compensation followed by unrestricted consideration by the Administrator, spoke of the Committee's desire to end extension of patent rights beyond the statutory period.

> The amendments also avoid an extension of the patent rights on chemicals. More importantly, these amendments eliminate FIFRA's most severe regulatory impact on the industry—the anti-competitive effects of *de facto* "exclusive use."

S.Rep. No. 95-334, 95th Cong., 1st Sess. (1977), at 31.

The House-Senate conference did not adopt S. 1678, but chose instead to provide a ten-year period of exclusive use for "new" data; *i.e.,* data submitted to support registrations granted after the effective date of the 1978 Act. That the protection of exclusive use applies only to this new data was made abundantly clear in the explanation of the conference bill offered by Senator Leahy, the floor leader and Chairman of the Subcommittee that had drafted S. 1678:

> *By limiting exclusive use to data pertaining to pesticide ingredients not previously registered,* and only for a 10-year period, the conferees have largely confined exclusive use coverage to chemicals that are patentable and for a term generally shorter than the patent life enjoyed by pesticides. *The anticompetitive aspects of exclusive use have therefore been essentially neutralized.*

124 Cong. Rec. S 25303 (Sept. 18, 1978 daily ed.) (emphasis added). The interpretation urged here by Chevron, that the 1978 amendments do not authorize consideration of pre-1970 data, would result in a perpetual period of *"de facto* exclusive use" for pre-1970 data, contrary to the views expressed by Senator Leahy.

Given the likelihood that Congress did not perceive a need to address explicitly the permissible uses of pre-1970 data, Senator Leahy's remarks appear to be the most persuasive evidence of legislative intent. In light of the perceived policy of the legislation as a whole, the prevention of an artificial extension of pesticide patent rights, the elimination of "anti-competitive" effects of the earlier legislation, and the authorization of unfettered reliance by EPA on certain classes of data, coupled with the likely reliance by Congress on the EPA's construction of the 1975 Act, I conclude that the 1978 amendments to FIFRA authorize consideration by the Administrator of pre-1970 data without the permission of the original data submitter and without an offer of compensation having been made.[6]

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[6] The Court recognizes that either interpretation of the statutorily permissible uses of pre-1970 data produces a somewhat anomalous result. For example, if the statute authorizes the use of pre-1970 data without compensation, then data submitted in December, 1969 generates no compensation, while data submitted only one month later will continue to generate compensation until January, 1985. Of course, many statutes establishing arbitrary deadlines, such as the Internal Revenue Code, produce similar results.

A contrary interpretation of FIFRA, however, leads to an even greater anomaly. If the use of pre-1970 data is not authorized, then the newest data (post-1978) would receive exclusive use protection that expires after ten year[s] [sic], older data (post-1969) would receive compensation protection that expires after 15 years, while the oldest data (pre-1970) would receive the greatest protection of all, exclusive use for an unlimited period. In my view, such a result was not intended by Congress.

III

PUBLIC OR PRIVATE PURPOSE OF ANY TAKING

The next issue presented is Chevron's contention that the Administrator's use of both its pre-1970 and post-1969 data may be enjoined as an unconstitutional taking of Chevron's property for a private rather than a public use. Use of Chevron's data is said to benefit only those competitors of Chevron who have not invested similar time, money and energy to develop their own test data, but now seek a "free ride" toward marketability for their pesticide products.

EPA, while contending that no taking is effected through mere consideration of Chevron's data, argues that even if a fifth amendment taking were to be found, the legislative history of FIFRA provides ample evidence of the public purposes of fostering competition in the pesticide industry and preventing extension of monopoly protection beyond the 17-year patent period. EPA therefore contends that Chevron is entitled at most to compensation for the taking of its test data, rather than to the injunctive relief it seeks.

Chevron relies heavily on *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937), which invalidated a gas proration order issued by the Railroad Commission of Texas because of its exclusively private purpose and effect. The statute authorizing the Commission's order was intended to eliminate waste of natural gas and prohibited "production of natural gas in excess of transportation or market facilities. . . ." 300 U.S. at 63. The actual order at issue reduced plaintiffs' allowable production to a volume far below their requirements to meet contractual obliga-

tions in various markets. The Court cited the lower court's finding that the purpose of the order was to force plaintiffs and others similarly situated:

> to buy gas from, and thus share their private marketing contracts and commitments and the use of their pipe lines and other facilities for transmitting their gas to market with, the owners of wells not now connected to pipe lines, who have not contributed in money, services, negotiations, skill, forethought or otherwise to the development of such markets and the construction of such pipe lines and other facilities.
>
> • • •
>
> The use of the pipe line owner's wells and reserves is curtailed solely for the benefit of other private well owners. . . . There is here no taking for the public benefit, nor is payment of compensation provided.

300 U.S. at 77-78.

Thompson is not controlling in the instant case for a number of reasons. First, the Court's holding there hinged on the complete absence of a public purpose for the taking. Had the proration order served a public purpose, "the fact that thereby other private persons would incidentally and gratuitously obtain important benefits would present no constitutional obstacle." 300 U.S. at 77. Further, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . The role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one." *Berman v. Parker,* 348 U.S. 26, 32 (1954). This judicial deference to legislative determinations is particularly

required when reviewing Federal as opposed to State legislation. *United States ex rel. Tennessee Valley Authority v. Welch,* 327 U.S. 546, 552 (1946).

As stated in Part II, *supra,* Congress had determined that the provisions of the 1972 and 1975 amendments to FIFRA were needlessly anti-competitive and were resulting to some extent in artificial extension of pesticide patent rights. The unavailability of previously submitted test data to support subsequent registration applications hampered the registration process and required subsequent applicants to produce and submit essentially the same information. Commenting on the counterproductivity of this process, EPA reported to Congress, "Multiple citations or submissions of the same data do nothing to enhance the determination of safety." Easier access to data would result in "an administrative cost saving to the Agency and to registrants." S.Rep. No. 95-334, 95th Cong., 1st Sess. (1977) at 63. *See also Id.* at 27, 30, 33. Any such cost saving, of course, inures eventually to the benefit of taxpayers and consumers.

Chevron contends that any Congressional intent to foster competition is not served in the instant case because there has been no legislative or judicial finding that Chevron enjoys monopoly power or has engaged in anti-competitive conduct. A similar argument was rejected in *Berman v. Parker, supra,* 348 U.S. at 34-35, where the Court declined to focus on the applicability of a broadly defined Congressional concern to a particular litigant. Congress may properly determine, as it did here, that the anti-competitive nature of the registration process affected the entire pesti-

cide industry. Its chosen method of alleviating this problem serves a public interest of sufficient magnitude to withstand a constitutional challenge.

IV

AVAILABILITY OF A TUCKER ACT REMEDY

Having concluded that the Administrator's consideration of Chevron's data is authorized, and that use of the data serves a public purpose, it remains to be determined whether just compensation is available through a Tucker Act[7] remedy in the Court of Claims. Chevron asserts that a Tucker Act remedy is unavailable for the use of pre-1970 data because such use is unauthorized and principles of sovereign immunity preclude recovery for an unauthorized taking. As to post-1969 data, for which compensation is statutorily provided, Chevron argues that the compensation scheme of negotiation and binding arbitration was intended by Congress to be the exclusive remedy available to data submitters, thereby evincing a legislative intent to withdraw the Tucker Act remedy.

EPA responds that there is no evidence indicating a Congressional intent to withdraw the Tucker Act grant of jurisdiction to the Court of Claims to hear a claim against the United States arising under the Constitution. *See*

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[7]The Tucker Act, 28 U.S.C. § 1491, reads in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Regional Rail Reorganization Act Cases, 419 U.S. 102, 126 (1974). The FIFRA statute itself most certainly is silent on the point, and the legislative history is said to demonstrate no Congressional consideration of the issue. Therefore, EPA argues, since a Tucker Act remedy remains available for any taking, EPA's action may not be enjoined. *Regional Rail Cases, supra. See also Duke Power Co. v. Carolina Environmental Study Group, Inc., supra,* 438 U.S. at 94 n.39; *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 697 n.18 (1949).

In passing on this same question, the court in *Amchem Products, Inc. v. Costle,* No. 76 Civ. 2913 (S.D.N.Y. July 5, 1979), stated:

> I do not deem it at all clear, given the specific provisions for payment and non-payment provided for in the 1978 FIFRA amendment 7 U.S.C. § 136a(c)(1)(D) that relief under the Tucker Act is the simple answer that the government claims. Not only does FIFRA expressly provide as to certain data there shall be no compensation at all, 7 U.S.C. § 136a(c)(1)(D)(iii), thus raising the question of the withdrawal of Tucker Act jurisdiction, see *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 126 (1974), but also, and more to the point, plaintiffs here do not seek damages but rather a declaratory judgment of unconstitutionality prior to sustaining potentially uncompensable damages. This they may properly do. *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 71 n.15 (1978).

Id. at 7. To the extent that the court in *Amchem Products* recognized a possible withdrawal in FIFRA of Tucker Act jurisdiction, I respectfully disagree.

Regional Rail Cases, supra, makes clear that Tucker Act jurisdiction is not to be deemed withdrawn by implication. 419 U.S. at 133-34. The data compensation language in the FIFRA statute, and the debate preceding it, relate to compensation to be paid by a *private* entity, the subsequent applicant, to the original data submitter. They do not address, much less limit, the liability of the *government* to pay just compensation if a taking occurs. This failure to consider recourse against the government may reflect nothing more than a Congressional belief, correct or otherwise, that the authorized use of the data by EPA effects no fifth amendment taking and hence does not give rise to governmental liability.

Chevron's argument that use of pre-1970 data is not authorized has been rejected in Part II, *supra.* As to post-1969 data, the binding arbitration provisions govern data compensation disputes between private entities. The statute prohibits judicial review of an arbitrator's decision as to how much compensation must be paid by a subsequent applicant to an original data submitter, thereby expediting final disposition of those disputes. Such an arbitration scheme between private parties cannot and does not preclude resort to the Court of Claims if the arbitrator's award is constitutionally deficient. *Cf. Pennsylvania v. Interstate Commerce Commission,* 535 F.2d 91, 97-98 & n.13 (D.C. Cir.), *cert. denied,* 429 U.S. 834 (1976).

Duke Power Co. v. Carolina Environmental Study Group, Inc., supra, does not require a contrary result. That case held that 28 U.S.C. § 1331(a) provided jurisdiction to hear a claim that an Act of Congress did not provide ad-

vance assurance of adequate compensation in the event of a taking, and upon a finding to that effect, the Declaratory Judgment Act, 28 U.S.C. § 2201, provided a remedy. 438 U.S. at 71 n.15. Once a determination of Tucker Act availability was made, however, a declaratory judgment or other injunctive relief on the taking issue was unwarranted. 438 U.S. at 94 n.39.

Accordingly, I conclude that the Administrator's use of Chevron's data is authorized, serves a public purpose, and that a remedy is available to Chevron under the Tucker Act for any taking that is effected. EPA's consideration of Chevron's data therefore may not be enjoined as an unconstitutional taking without just compensation.[8]

V

RETROACTIVE APPLICATION OF THE STATUTE

Chevron alleges finally that elimination of the prohibition against the use of trade secrets effected by the 1978 FIFRA amendments retroactively divests Chevron of its property right of exclusive use without due process of law. In support of this claim, Chevron asserts that it submitted its trade secret test data to EPA and its predecessor agencies with the expectation that trade secrets would not be made available to support registration applications by competitors. This expectation grew out of state common law protection for trade secrets, federal agency practice and procedure, and the explicit prohibition against the Ad-

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[8]As noted at pages [A-39 to A-41], *supra*, no view is expressed as to whether EPA's use of the data actually constitutes a fifth amendment taking entitling Chevron to just compensation.

ministrator's use of trade secrets embodied in the 1972 and 1975 versions of FIFRA. The 1978 Act, which authorizes consideration of trade secret data, is said to apply retrospectively to defeat this settled expectation.

EPA disputes the contention that the statute applies retroactively, arguing that use of trade secret data is authorized only to support registrations issued after the effective date of the 1978 FIFRA amendment. EPA seeks to distinguish on this basis the holding in *Ettor v. Tacoma*, 228 U.S. 148 (1913), which invalidated a legislative attempt to immunize a municipality from liability for damage caused to a private citizen's property by street grading operations. The statute authorizing a claim for damages against the city was repealed after the plaintiff's property had been damaged, and therefore after his right to compensation had vested. 228 U.S. at 155-58. EPA asserts in the instant case that the 1978 FIFRA amendments do not undermine Chevron's claims *under the earlier statutes* to prevent the issuance of registrations where Chevron's trade secret data was used prior to 1978, but govern only the permissible use of that data after the effective date of the 1978 Act.

It must be concluded, however, that the 1978 FIFRA amendments do have a retroactive effect. Just as the plaintiff's expectation of compensation in *Ettor* arose prior to the statute in question, so too did Chevron's expectation of exclusive use for trade secrets arise before enactment of the 1978 Act. The question before the Court is whether Chevron's expectations may be defeated in the manner prescribed by Congress.

If, as Chevron contended earlier, the Administrator's use of Chevron's data constitutes a "taking" of Chevron's property, its due process claim must necessarily fail, for the mere exercise of eminent domain power does not offend due process. *Roberts v. New York City,* 295 U.S. 264 (1935); *Elterich v. City of Sea Isle City,* 477 F.2d 289, 290 (3d Cir. 1973). In such case, Chevron's available remedy in the Court of Claims fully satisfies constitutional requirements.

Alternatively, if use of the data is not a taking, the inquiry under due process analysis is whether the law is rationally related to a legitimate state interest.

> [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955). The burden of demonstrating the statute's irrationality is on Chevron.

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). Retroactive measures are subjected to a closer degree of scrutiny than are purely prospective measures. *Id.* at 16-17; *Daughters of Miriam Center for the Aged v. Mathews,*

590 F.2d 1250, 1259 (3d Cir. 1978). Nevertheless, even retroactive legislation retains at the outset its presumption of constitutionality. *Cf. Daughters of Miriam, supra,* 590 F.2d at 1257. Further, the Constitution does not prohibit "the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," even though otherwise settled expectations may be upset thereby. *Duke Power Co. v. Carolina Environmental Study Group, Inc., supra,* 438 U.S. at 88, n.32, *quoting Silver v. Silver,* 280 U.S. 117, 122 (1929); *Usery v. Turner Elkhorn Mining Co., supra,* 428 U.S. at 16. This principle is particularly evident in the context of zoning or other land use restrictions which survive constitutional challenge despite their effect of undermining property owners' settled expectations. *See, e.g., Rogin v. Bensalem Township,* No. 79-1361, slip op. at 16-17 (3d Cir. Feb. 21, 1980); *Haas v. City and County of San Francisco,* 605 F.2d 1117, 1119-21 (9th Cir. 1979), *cert. denied,* 48 U.S.L.W. 3602 (U.S. March 17, 1980).

In the instant case, Congress determined that the pesticide registration program was operating ineffectively under the 1975 amendments to FIFRA. Restrictions on the use of data were thought to contribute to artificial extension of pesticide patent rights and to stifle competition in the industry. *See Part II, supra.* Since the enhancement of competition in interstate commerce is certainly a permissible legislative objective, it remains only to determine whether the legislative scheme chosen is a sufficiently reasonable means of attaining the Congressional goal. Where the legislation in question is retroactive, this determination

entails a balancing of the public interest in the retroactive rule with the private interests that are upset by it. *Daughters of Miriam, supra,* 590 F.2d at 1260 & n.27.

As noted earlier, the statutory provisions challenged here permit the use rather than the disclosure of a registrant's trade secret data to support a subsequent application. If Chevron's trade secret data contains information beyond that which was necessary to obtain its own registrations, such information will not fall into the hands of Chevron's competitors by operation of § 3(c)(1)(D). If, on the other hand, Chevron's data contains only the minimal amount of information necessary to secure its registrations, no less "revealing" data could have been submitted by Chevron if it hoped to market its product. In either case, therefore, Chevron has suffered no prejudice by operation of § 3(c)(1)(D) because of its reliance on the earlier statutory provisions.

The 1978 FIFRA amendments to § 3(c)(1)(D) simply permit EPA to review data already in its files to assure itself that a pesticide product previously shown to be safe and efficacious remains so when marketed under another brand name. When one considers the alternative means available to foster competition by easing registration barriers, such as release of all data by EPA to subsequent applicants for resubmission by them, or, at the opposite extreme, elimination altogether of the need for safety and efficacy data submissions, it appears that Congress has chosen a reasonable cure for the perceived problem. The challenged legislation does not offend due process considerations.

Having considered those few facts that are disputed in the light most favorable to Chevron, I conclude that defendant Costle is entitled to judgment as a matter of law. Accordingly, plaintiff's application for a preliminary injunction will be denied, and defendant's motion for summary judgment will be granted.

Appendix C

1972 amendments to § 3(c)(1)(D) of FIFRA, Pub. Law 92-516 (Oct. 21, 1972), 86 Stat. 979-980:

"(c) PROCEDURE FOR REGISTRATION.—

(1) STATEMENT REQUIRED.—Each applicant for registration of a pesticide shall file with the Administrator a statement which includes—

"(A) the name and address of the applicant and of any other person whose name will appear on the labeling;

"(B) the name of the pesticide;

"(C) a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use;

"(D) if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, except that data submitted in support of an application shall not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless such other applicant shall have first offered to pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by section 10(b).[1] If the parties cannot agree on the

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[1]1972 amendments to § 10(b) of FIFRA, Pub. Law 92-516 (Oct. 21, 1972), 86 Stat. 989:

"(b) DISCLOSURE.—Notwithstanding any other provision of this Act, the Administrator shall not make public information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential, except that, when necessary to carry out the provisions of this Act, information relating to

amount and method of payment, the Administrator shall make such determination and may fix such other terms and conditions as may be reasonable under the circumstances. The Administrator's determination shall be made on the record after notice and opportunity for hearing. If the owner of the test data does not agree with said determination, he may, within thirty days, take an appeal to the federal district court for the district in which he resides with respect to either the amount of the payment or the terms of payment, or both. In no event shall the amount of payment determined by the court be less than that determined by the Administrator;"

1975 amendments to § 3(c)(1)(D) of FIFRA, Pub. Law 94-140 (Nov. 28, 1975), 89 Stat. 755:

SEC. 12. Section 3(c)(1)(D) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, is amended to read as follows:

"(D) if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, except that data submitted on or after January 1, 1970, in support of an application shall not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless such other applicant shall have first offered to pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by section 10(b).[2] This provision with regard to compensation for producing the test data to be relied

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formulas of products acquired by authorization of this Act may be revealed to any Federal agency consulted and may be revealed at a public hearing or in findings of fact issued by the Administrator."

[2]See footnote 1, supra.

upon shall apply with respect to all applications for registration or reregistration submitted on or after October 21, 1972. If the parties cannot agree on the amount and method of payment, the Administrator shall make such determination and may fix such other terms and conditions as may be reasonable under the circumstances. The Administrator's determination shall be made on the record after notice and opportunity for hearing. If either party does not agree with said determination, he may, within thirty days, take an appeal to the Federal district court for the district in which he resides with respect to either the amount of the payment or the terms of payment, or both. Registration shall not be delayed pending the determination of reasonable compensation between the applicants, by the Administrator or by the court.".

1978 amendments to § 3(c)(1)(D) of FIFRA, Pub. Law 95-396 (Sept. 30, 1978), 92 Stat. 820-822:

SEC. 2. (a) Section 3 of the Federal Insecticide, Fungicide, and Rodenticide Act is amended by—

(1) amending subsection (c)(1)(D) to read as follows:

"(D) except as otherwise provided in subsection (c)(2)(D) of this section, if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions:

"(i) With respect to pesticides containing active ingredients that are initially registered under this Act after the date of enactment of the

Federal Pesticide Act of 1978, data submitted to support the application for the original registration of the pesticide, or an application for an amendment adding any new use to the registration and that pertains solely to such new use, shall not, without the written permission of the original data submitter, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide: *Provided,* That such permission shall not be required in the case of defensive data;

"(ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for reregistration, the Administrator may, without the permission of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the 'applicant') within the fifteen-year period following the date the data were originally submitted only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator accompanied by evidence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or,

failing such agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. The parties to the arbitration shall share equally in the payment of the fee and expenses of the arbitrator. If the Administrator determines that an original data submitter has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the original data submitter shall forfeit the right to compensation for the use of the

data in support of the application. Notwithstanding any other provision of this Act, if the Administrator determines that an applicant has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the Administrator shall deny the application or cancel the registration of the pesticide in support of which the data were used without further hearing. Before the Administrator takes action under either of the preceding two sentences, the Administrator shall furnish to the affected person, by certified mail, notice of intent to take action and allow fifteen days from the date of delivery of the notice for the affected person to respond. If a registration is denied or canceled under this subparagraph, the Administrator may make such order as the Administrator deems appropriate concerning the continued sale and use of existing stocks of such pesticide. Registration action by the Administrator shall not be delayed pending the fixing of compensation;

"(iii) after expiration of any period of exclusive use and any period for which compensation is required for the use of an item of data under subparagraphs (D)(i) and (D)(ii) of this paragraph, the Administrator may consider such item of data in support of an application by any other applicant without the permission of the original data submitter and without an offer having been received to compensate the original data submitter for the use of such item of data;"

Appendix D

United States Court of Appeals
For the Third Circuit

No. 80-2037

Chevron Chemical Company,
Appellant

v.

Douglas M. Costle
(D.C. Civil No. 79-00532)

SUR PETITION FOR REHEARING

Present: Seitz, *Chief Judge*, Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham and Sloviter, *Circuit Judges*

The petition for rehearing filed by
Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ JOHN GIBBONS
Judge

Dated: March 3, 1981

Appendix E

United States Court of Appeals
For the Second Circuit

No. 828—September Term 1979
(Argued March 21, 1980 Decided July 16, 1980)

Rehearing denied October 2, 1980

Rose L. Kramer, 100% Stockholder—
Finast Metal Products, Inc.,
Plaintiff-Appellant,

against

Secretary, United States Department of
the Army and Chief, Legal Department of
the Department of the Army,
Defendants-Appellees.

Before: Kaufman, Timbers, *Circuit Judges*,
and Lasker, *District Judge*.*

Appeal from an order of the United States District Court for the Eastern District of New York, Costantino, J., dismissing plaintiff's *pro se* action under the Federal Tort Claims Act for failure to state a claim upon which relief can be granted.

Reversed and remanded.

*Hon. Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation.

Lasker, D.J.

Rose Kramer, appearing *pro se,* appeals from an order dismissing her complaint for failure to state a claim upon which relief can be granted. Because we conclude that Kramer has stated a cause of action for wrongful misuse of a trade secret under New York law that is within the jurisdiction of the district court under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), we reverse the order of the district court and remand the case for further proceedings.

In determining the sufficiency of Kramer's complaint, the district court properly looked beyond the complaint itself, which was prepared without the aid of counsel and provides only an imperfect view of her claim. We, too, have considered Kramer's submissions in addition to the formal pleadings in piecing together her factual allegations and legal theories. We rely in particular on Kramer's memorandum of law and fact in opposition to defendants' motion to dismiss, dated June, 1979.

As reported there, the circumstances that bred this lawsuit relate to a contract for the manufacture of 60 mm. mortar projectiles let by the Army to Finast Metal Products, Inc., a corporation owned and managed by Kramer. Because a multitude of difficulties arose in connection with the contract almost from the moment Finast's bid was opened, on September 10, 1973, and determined to be the lowest responsive bid submitted, the contract was not awarded until June 18, 1974, following extensive surveys, negotiations, and reviews. Of the intervening events, those particularly relevant here relate to Kramer's efforts to

locate a foundry willing and able to supply 60 mm. forging blanks for use in the production of 60 mm. projectiles.

When she submitted Finast's bid to the Army, Kramer expected to use blanks supplied by the National Extruded Metal Products Company ("Nempco"), the only known source of such blanks. However, in January, 1974, she learned that Nempco was about to go out of business and would not be able to supply forgings to Finast. The very day she learned this, Kramer telephoned an acquaintance, an engineer and entrepreneur who was in the process of setting up a foundry. He informed her that his new company would be able to supply the forging blanks Finast would require in order to fulfill the contract then being worked out with the Government. That company, Canusa Extrusion-Engineering, Inc. ("Canusa"), was established shortly thereafter.

Kramer notified the Government that she had located a new supplier of forging blanks, but declined to identify the new source until the Government agreed to treat the information in confidence. She asserts that the government did agree, and on May 14, 1974, she sent the Government a mailgram identifying Canusa as the new supplier. Her mailgram stated:

> "Due to circumstances existing in the world market and the fact that this supplier is presumably the only known additional source and was developed by us for the production of the subject items, we claim that the name and address of this source is proprietary information to our company and must not be divulged to competitors or other sources of supply for 60mm projectiles."

Government inspectors then visited Canusa's plant and eventually approved Canusa as a subcontractor for 60 mm. forging blanks.

Having obtained the identity of her source, Kramer charges, Government employees contrived to award Finast a contract they knew was unworkable, to wrongfully terminate that contract, and to put Finast out of business, so that they could award the contract for the production of 60 mm. projectiles to a favored firm, to which they disclosed Canusa's identity.

Although Kramer's pleadings and other papers contain wide-ranging charges, and her detailed and lengthy allegations of fact are broad enough to compass a variety of causes of action, the gravamen of her complaint is the claim that the Government wrongfully procured and disclosed the identity of the new source of forgings that she had discovered. Thus, the introductory paragraph of her memorandum of law and fact in opposition to the defendants' motion to dismiss complains of alleged

> "wrongful acts of Government employees while acting within the scope of their office and employment in order to conspiratorilly [sic] gain control of plaintiff's sole source 60 MM forging subcontractor, the only independent Government approved 60 MM forging source in the United States then, so that these Government employees could place contracts for 60 MM projectiles with their favored prime contractors . . . ."

Kramer persists in mislabelling this claim as one for "conversion." On the Government's motion to dismiss, the district court properly looked beyond the label to the facts alleged in reviewing Kramer's complaint. The court dis-

missed the complaint "pursuant to reasons placed on the record after argument" in a hand endorsement dated July 17, 1979. After Kramer moved for reargument, the district court issued a memorandum of decision and order dated August 17, 1979, reaffirming the prior dismissal. There the court stated:

> "It is clear that to the extent that plaintiff seeks review of the administrative action below [in which Kramer unsuccessfully appealed the termination of Finast's contract to the Armed Services Board of Contract Appeals], the Court of Claims is the proper forum because she seeks damages in excess of $10,000. 28 U.S.C. § 1346(a)(2). And while conversion does state a cause of action under the Federal Tort Claims [Act], the facts as alleged by plaintiff do not constitute conversion but rather constitute a claim for intentional interference with contract rights. Suits based on such a claim may not be brought under the Federal Tort Claims Act. 28 U.S.C. § 2680(h)."

To the extent that Kramer seeks damages for breach of contract in excess of $10,000., or for tortious interference with her subcontract with Canusa, the district court's decision is correct. However, we believe the court erred in concluding that the claim that Kramer insists on labelling one for conversion was in fact a claim for intentional interference with contract rights. If Kramer's *pro se* complaint is liberally construed, her putative "conversion" claim must be viewed as a cause of action for misappropriation of a trade secret recognized under New York law and consequently within the district court's jurisdiction under the Federal Tort Claims Act.

Stripped to their essentials, Kramer's factual allegations reduce to this: the Government induced Kramer to disclose the identity of her supplier in confidence, and then divulged that information to others in breach of that confidence. Kramer's knowledge of Canusa's willingness to supply 60 mm. forging blanks constituted a trade secret protected by New York law. " 'A trade secret, like any other secret, is nothing more than private matter; something known to only one or a few and kept from the general public; and not susceptible to general knowledge.' " *Leo Silfen, Inc. v. Cream*, 29 N.Y.2d 387, 394-95, 328 N.Y.S.2d 423, 430 (1972) (quoting *Abdallah v. Crandall*, 273 App. Div. 131, 133, 76 N.Y.S.2d 403, 406 (3d Dept. 1948)). Kramer alleges that she was the only one who knew of Canusa's willingness to supply the forgings in question, and her documented reluctance to disclose the identity of her source to the Government for fear that it would divulge this information to a competitor demonstrates that she regarded the information as proprietary. Since she disclosed that information in confidence, she did not, as a matter of law, make the sort of "dissemination to the trade and public" that would defeat her claim of trade secret protection. *Ewen v. Gerofsky*, 86 Misc. 2d 913, 918, 382 N.Y.S.2d 651, 655 (Sup. Ct. N. Y. Co. 1976) (Fein, J.).

Under New York law, then, Kramer's complaint states a cause of action sounding in tort. This brings her claim within the purview of the Federal Tort Claims Act, which creates exclusive jurisdiction in the district courts over tort claims against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the

place where the act or omission occurred." 28 U.S.C. § 1346(b). There remains only the question whether her action can be maintained despite the provisions of 28 U.S.C. § 2680(h), which bars any claim under the Federal Tort Claims Act

> "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation, deceit,* or interference with contract rights."

At oral argument the Government suggested that even if Kramer's complaint is construed as stating a claim for misappropriation of a trade secret, her claim is barred because she charges that the Government accomplished its tortious object through fraud and deceit, which, the Government argues, brings her claim within the scope of section 2680(h). However, the essence of the tort of misappropriation of a trade secret is the unauthorized use or disclosure of secret information obtained through improper means, including theft, espionage, bribery, and coercion as well as trickery, or in breach of confidence, including breach of a good faith representation that a confidence would be protected as well as a fraudulent misrepresentation to the same effect. Although Kramer's papers are replete with charges of deceit leveled at Government employees, those charges form no necessary element of her claim, which is simply that she provided secret information to the Government in confidence, and that the Government subsequently made unauthorized use of that information. If proven, this alone would establish the Government's liability. "One does not have a right to secure a trade secret or invention by reason of a confidential

relationship and to use it without accounting to the source." *Ewen v. Gerofsky, supra,* 86 Misc. 2d at 918, 382 N.Y.S.2d at 655.

The dissent argues that Kramer will not be able to establish that Canusa's identity qualifies as a trade secret under New York law. Of course, if she cannot, her claim must fail. But the record establishes that she clearly considered it a secret, and treated it as a secret. The question whether it was actually a secret is one of fact that must be determined by the trier. The dissent also argues that Kramer was required to disclose the identity of her subcontractor as part of the government's pre-award survey procedure, and that she did so "freely and voluntarily." However, Kramer's allegations are quite clear that whatever the requirements may have been, government employees agreed to honor her demand that the information, once disclosed, be treated in confidence, and that she disclosed it only in reliance on this commitment. If she proves this, and the government's failure to honor that commitment, it is irrelevant whether (as she also alleges) the government intended to honor the commitment when it made it. Thus, although Kramer clearly believes that the government acted deceitfully, she need not prove that it did so to prevail on her claim.

As an alternate ground for affirming the district court's decision, the Government asserts that Kramer failed to exhaust all available administrative remedies before commencing this suit. Since the government did not raise this jurisdictional defense below, we do not have an adequate record before us to pass upon it here. Specifically, we do not know the fate of Kramer's administrative claim sub-

mitted to the Army. Similarly, the Government's statute of limitations defense, not raised below, should be heard there first.

We conclude that the district court's characterization of Kramer's "conversion" claim was in error, and that properly construed that claim states a cause of action for misuse of a trade secret that is within the district court's jurisdiction under the Federal Tort Claims Act.

Accordingly, we reverse and remand this case to the district court for further proceedings.

Timbers, *Circuit Judge,* dissenting:

If this case involved no more than the majority's liberal reading of a pro se litigant's complaint, there would be no occasion for this dissent. That rule of contruction has long been established by our Court and the Supreme Court. *E.g., Haines v. Kerner,* 404 U.S. 519 (1972).

What the majority has done, however, goes far beyond a liberal construction of the complaint, read in the context of the record before the district court. In what strikes me as a transparent effort to bring appellant under the Federal Tort Claims Act, the majority sua sponte has devised a purported cause of action for misappropriation of a trade secret which neither appellant nor her attorney in the district court ever remotely suggested—*a cause of action, moreover, which finds no support whatsoever in the record,* even read in the light most favorable to appellant. For these reasons I respectfully but emphatically dissent.

It is important to keep in mind that appellant herself never has made any claim that the government misappro-

priated any trade secret. Nowhere in the district court record or in the briefs before this Court does there appear any suggestion of an allegation involving a trade secret. This is not a case where an inexperienced layman has failed to comply with technical rules of pleading or has stumbled in selecting a precise tort rubric. Appellant's asserted tort claims are many and varied, but they lie in other areas—misrepresentation, deceit, or interference with contract rights—which are expressly excluded by § 2680(h) of the Federal Tort Claims Act.

Moreover it is noteworthy that, although appellant appeared pro se in our Court and at various times in the district court, she did have the aid of counsel in the district court proceedings on the motion to dismiss her complaint which gave rise to this appeal. Yet neither appellant nor her counsel ever mentioned a trade secret either in the arguments before the district court or in the memorandum of law filed in the district court in opposition to the motion to dismiss. While we of course must be vigilant in safeguarding the rights of pro se litigants, it seems to me that this Court furthers no sound policy by devising new claims or theories of law for litigants who are capable of advancing such claims themselves, but fail to do so.

The majority's ill-advised rush to bring appellant's claim under the Federal Tort Claims Act is further compounded by the utter lack of support in the record for a claim of misappropriation of a trade secret. This is so for at least two reasons.

First, as a matter of law, appellant will not be able to demonstrate that the name of a single, independent sup-

plier of 60 mm. "forging blanks" (i.e., her subcontractor) could qualify as a trade secret under New York law which is applicable here. 28 U.S.C. § 1346(b) (1976). There simply is no real secret involved. The forging subcontractor was not precluded from publicizing its capabilities to others or from dealing with appellant's competitors.[1] Moreover the existence of this forging subcontractor was required to be disclosed to the government as part of the pre-contract award procedure; and, when the government conducted a pre-award survey of appellant and her subcontractor, the existence of the latter became part of the public domain. *See, e.g., Ferranti Electric, Inc. v. Harwood,* 43 Misc. 2d 533, 537-40, 251 N.Y.S. 2d 612, 616-19 (Sup. Ct., Nassau County, 1964) (held that name of supplier and information disclosed in reports to government were not trade secrets). Mere conclusory statements by

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[1]The forging subcontractor, Canusa Extrusion-Engineering Inc., was wholly independent of appellant. Canusa simply had entered into an arrangement with appellant whereby Canusa agreed to sell 60 mm. forging blanks to appellant. In an earlier, related case, the district court found that

> "the agreement [between appellant and Canusa was] to continue as long as [appellant] 'has either bids pending, contracts or is involved in the 60 mm. program' or 'until such time that in the opinion of "Canusa" this arrangement becomes detrimental to "Canusa's" best interest', provided that '"detrimental" does not mean not accepting 60 mm. forging blank business from others' than [appellant]."

Finast Metal Products, Inc. v. Canusa Extrusion-Engineering, Inc., Civil Action No. 76 C 64 (E.D.N.Y. May 12, 1978) (Nickerson, J.). Thus, Canusa was obligated only to fill appellant's orders for forging blanks and to do so only as long as certain preconditions were met. Appellant had no further control over Canusa's actions.

appellant that such information was "secret" or "proprietary" cannot transform the subcontractor's existence into a trade secret.

Second, assuming arguendo that somehow appellant could get over this hurdle and establish that the name of her subcontractor was a trade secret, there still are no allegations—and no basis in the record for allegations—that the government "misappropriated" this information. Appellant gave the name of her subcontractor to the government freely and voluntarily as part of her effort to win a government contract for the manufacture of 60 mm. mortar projectiles. The contract would not have been awarded without the pre-award survey by the government of appellant and her subcontractor referred to above; and the survey could not have been made without disclosure of the name of the subcontractor. If appellant had decided *not* to disclose her "secret" subcontractor to the government, then the "secret" would have been worthless; she would have been awarded no contract and she would have had no need of a subcontractor. In short, the government did not "misappropriate" anything. It was given information by appellant as part of a standard procedure by which appellant sought to win a government contract. Appellant's grievance, viewed in the light most favorable to her, is not that the government stole her "secret", but rather that the government deceived her into signing a contract which she could not perform and then "took away" her subcontractor when she defaulted. Such "deceit", however, is not actionable under § 2680(h) of the Federal Tort Claims Act.

If this case involved a hapless pro se litigant who had mislabeled a valid cause of action under the Federal Tort Claims Act, I would agree with my brothers that it should be remanded to the district court. But I think it is elemental that courts should not restructure a pro se litigant's allegations in order to state a claim which does not exist. Appellant's claim is *not* that a trade secret was stolen by the government; her claim *is* that the government wrongfully terminated her contract in order to "take over" her forging subcontractor. In other words, appellant claims that the government purposely destroyed her business relationship with her subcontractor so that the subcontractor would be free to sell its forging blanks to others. Such a claim is not actionable under the Federal Tort Claims Act, since § 2680(h) excludes misrepresentation, deceit, or interference with contract rights from the coverage of the Act. As a Court, we should not concoct a new claim for appellant in order to bring her under the Act, especially when Congress has expressly excluded from coverage under the Act the only claim appellant asserts.

I therefore dissent.